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No. 87-2052

In The
Supreme Court of the United States
October Term, 1987

M.E.F. ENTERPRISES, INC. and M.K.D. ENTERPRISES, INC.,

Petitioners,

vs.

THE CITY OF HOUSTON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED*

1. Whether the Court of Appeals applied an erroneous standard of review, in conflict with decisions of this Court, and of other Courts of Appeals, in upholding regulations which place a substantial and unjustified burden on constitutionally protected dance entertainment.

A. Does the Court's decision in *Boos v. Barry*, 106 S.Ct. 1157 (1988) require strict scrutiny review, rather than the deferential review afforded time, place or manner regulations on speech, where the secondary effect allegedly giving rise to the governmental interest is the "dehumanizing effect" of the speech on the surrounding community.

B. Is a higher level of scrutiny, i.e. "strict scrutiny," required where the burden on speech is no longer incidental in that 58% of existing businesses are required to relocate to a limited number of locations?

C. If strict scrutiny is not required, does the holding in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) require use of the least-restrictive means test as suggested by the summary affirmance in *City of Watseka v. Illinois Public Action Council*, 107 S.Ct. 919 (1987)?

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*On May 4, 1988, in *FW/PBS, Inc. v. City of Dallas*, Case No. A-800, this Court granted FW/PBS, Inc. a stay pending action on a Petition For Writ of Certiorari. While the stay did not run to the zoning issues presented in that case, the zoning issues presented here are similar, although not identical, to ones which will be raised in that case. In fact, The Fifth Circuit opinion in *FW/PBS* relies on its decision in *SDJ, Inc. v. City of Houston* (the instant case) as the basis for its holding on the zoning issues. See *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 837, 1302 (5th Cir. 1988).

D. If the only available locations under an adult zoning ordinance are in remote industrial areas or areas unsuited to commercial retail activities, has the requirement of *Renton,* that adult businesses must be afforded "a reasonable opportunity to open and operate," been met?

2. Whether artistic dance presentations, which includes display of the female breast, are entitled to the full protection of the First Amendment to the United States Constitution?

LIST OF PARTIES*

The following is a list of all parties of record appearing in the United States Court of Appeals for the Fifth Circuit in addition to those appearing in the caption of the present petition:

SDJ, INC., d/b/a SUGAR BABES; W.F.K., INC. FOR d/b/a SUGAR'S; W.F.K., INC. SIX d/b/a SUGAR'S DEJAVU; T.D.D., INC. d/b/a LITTLE DARLINGS; EVAN LOWENSTEIN d/b/a LEGACY; GRINGO'S SALOON, INC. d/b/a FANTASIA; 747, INC. d/b/a TEXAS COWGIRLS; TWO GREEKS, INC. d/b/a IMAGINATIONS; SPIROS KARMAELEGOS d/b/a TEXAS FILLIES; HI-10, INC. d/b/a HI-10 CABARET; TRUMPS, INC. d/b/a RICK'S CABARET; SOUTHWEST CLUB CO., INC. d/b/a PLAYMATES; SSD, INC. d/b/a RITZ CABARET; ARIS MYLONAS d/b/a BOGEY'S; JIMMY TSAROUCHAS d/b/a CRICKET'S J&J, INC. d/b/a PINK PUSSYCAT; VAT, INC. d/b/a YELLOW ROSE OF TEXAS; ALEXANDRIA VIVI BARSAKIS d/b/a WHIP CLUB; Da JOHN, INC. d/b/a DREAM STREET

Pursuant to Supreme Court Rule 19.6, Petitioner believes the Respondents before this Court to be:

THE CITY OF HOUSTON and the above-named parties who were parties in the Court below.

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*There are no entities to report or list pursuant to this Court's Rule 28.1.

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In The
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *SDJ, Inc. v. City of Houston,* 837 F.2d 1268 (5th Cir. 1988) and is printed as Appendix A beginning at App. 1; the order and opinion denying rehearing are reported at 841 F.2d 107 (5th Cir.

1988) and are printed as Appendix B beginning at App. 24. The opinion of the United States District Court is reported as *SDJ, Inc. v. City of Houston,* 636 F.Supp. 1359 (SD Tex., 1986) and is printed as Appendix C beginning at App. 29.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion in this matter on February 10, 1988. The Court, in a per curiam opinion, denied rehearing on March 15, 1988. This Petition is filed within ninety (90) days of that date. The opinion of the United States Court of Appeals for the Fifth Circuit constitutes a final judgment in a civil case upholding the constitutionality of various regulations on constitutionally protected expression pursuant to City of Houston's sexually oriented business law. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Neither Court below certified to the Texas Attorney General the fact that the constitutionality of the Houston ordinance was drawn into question and that 28 U.S.C. § 2403(b) may be applicable. Pursuant to Rule 28.4(c) of this Court, Appellants have served three copies of this Petition For Writ Of Certiorari upon the Attorney General of the State of Texas.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS FROM CITY OF HOUSTON ORDINANCE

The full text of Houston Ordinance No. 86-323 is set forth in Appendix I to the District Court's Opinion and is printed in Appendix C beginning at App. 59.

STATEMENT OF CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 and § 1343 to redress the deprivation under color of law of rights and privileges secured by the Constitution of the United States.

The Petitioners, M.K.D. Enterprises, Inc. and M.E.F. Enterprises, Inc., operate businesses within the City of Houston which are licensed to sell alcoholic beverages and feature topless dance entertainment.[1] The business of M.K.D. Enterprises, Inc. is located within 750 feet of a school.[2] The business of M.E.F. Enterprises, Inc. is located within 750 feet of a school and within 750 feet of a residence.[3]

On March 5, 1986, the Houston City Council passed Ordinance No. 86-323. The Ordinance placed locational and signage restrictions on the Petitioners' businesses. In pertinent part, the Ordinance requires that adult lounges, i.e. topless bars, be removed at least 750 feet from schools, churches or daycare centers.[4]

The Ordinance contains findings of fact, three of which are relevant to the questions presented for review. They provide as follows:

> WHEREAS, City Council finds that churches and schools are centers of family oriented activities and therefore enhance the quality of life and surrounding areas; and
>
> WHEREAS, City Council finds that sexually oriented commercial enterprises can exert a dehumanizing influence on persons attending churches or schools in the surrounding areas; and
>
> WHEREAS, City Council finds that sexually oriented commercial enterprises can contribute to the impairment of the character and quality of a surrounding residential neighborhood; . . .

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[1]Section 28-121 of the Ordinance defines such a business as an "Adult Lounge."

[2]T.Vol. 1, p. 181. "T.Vol." refers to the Trial Transcript Volume indicated.

[3]T.Vol. 1, p. 186.

[4]Section 28-125(b)(1).

Testimony offered by the City at trial indicated that signage outside of topless bars had a detrimental effect on the mental health of minors.[5] However, no one was able to document that effect.[6] Trial testimony also indicated that the committee which studied the effects of sexually oriented businesses felt that the most effective way to deal with the "dehumanizing" impact of those businesses was to regulate their exterior appearance.[7] The trial testimony showed that the signage and exterior condition regulations of Sections 28-129 and 28-130[8] should cure any perceived evil of adult lounges being located in proximity to schools[9] or residential areas inasmuch as the sole basis in the record for restricting the businesses of the Petitioners with respect to schools and residential areas was the alleged "dehumanizing effect" of their signage and exterior condition which, it was hypothesized, had an adverse effect on minors.[10] No other secondary effect of topless bars is identified in the record.[11]

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[5]T.Vol. IV, p. 191.

[6]Id. at 192-197.

[7]Id. at 245. This testimony was fully consistent with the legislative history. SRE 2, p. 35. "SRE" refers to the Supplemental Record Excerpts filed in the Court below.

[8]These sections prohibit the activities within the establishment from being visible from the outside, limit and regulate exterior signage and lighting, and require the exterior to be painted a single achromatic color.

[9]T.Vol. IV, p. 236-237.

[10]T.Vol. IV, p. 191.

[11]The 1982 report (SRE 2) used to justify the regulation of other sexually oriented businesses contains absolutely no evi-

(Continued on following page)

The legislative history of Ordinance 86-323 indicates that the City's pre-enactment research estimated that there would be approximately sixty (60) sites available around the City for the location and relocation of adult lounges.[12] However, of the sites hypothesized by the City, none had been checked to determine if there was vacant rentable space available for leasing or sale to a topless business.[13] No effort was made to locate possible sites with traffic patterns similar to existing locations, nor was any study undertaken to determine if any of the displaced businesses could actually relocate to one of these potential sites.[14] Nobody at the City cared whether, in fact, space was available.[15]

(Continued from previous page)

dence as to the adverse secondary effects of topless bars. In fact, the only mention of topless bars occurs on pages 22, 25 and 34 where the report indicates that topless bars were exempted because of preemption by state law and noting that they are subject to the signage and exterior condition regulations. The 1982 report contains no conclusions concerning topless bars. There is no evidence in the record to support a finding that topless bars cause the same secondary effects as the businesses studied by the 1982 report.

This conclusion is supported by the fact that the City Council made specific findings concerning the effects of topless bars when it enacted Ordinance 86-323.

[12]SRE 3, p. 10. Houston is the fourth largest city in the United States covering approximately 573 square miles. Compare this to the City of Renton (approximately 15.3 square miles) which set aside land which would accommodate well over 400 adult theatres. See note 24, infra.

[13]T.Vol V, p. 183.

[14]Id. at 214-216.

[15]Id. at 229.

With this evidence before it, the City passed Ordinance 86-323, which required the relocation of 58% of the adult lounges in the City of Houston into a limited number of sites, most of which were not commercially viable or available.[16] Unrebutted evidence at trial demonstrated that leases for adult lounges are difficult to obtain and that under the Ordinance, it would be virtually impossible to find a location for such a business.[17] A real estate expert called by the City to testify about available locations within the City could not identify any specific available location.[18]

On March 31, 1986, the owners of 23 topless bars located within the City of Houston filed suit challenging the validity of the Ordinance on a number of federal constitutional and state statutory grounds. After trial, the United States District Court for the Southern District of Texas decided the Ordinance to be constitutional in all material respects. *SDJ, Inc., et al. v. The City of Houston, et al.*, 636 F.Supp. 1359 (S.D. Tex. 1986). Petitioner filed an appeal in the United States Court of Appeals for the Fifth Circuit. That Court, in an opinion, filed February 10, 1988, affirmed the judgment of the District Court. 837 F.2d 1268 (5th Cir. 1988).

In its ruling, the Court of Appeals made several significant holdings which, Petitioners contend, depart from

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[16]Of 48 sexually oriented businessees which applied for permits, only 17 were approved (T.Vol. III, p. 140). Of the 31 applications that were not approved, 3 had problems that could be corrected.

[17]T.Vol. 1, p. 247-250.

[18]T.Vol. V, p. 13.

established precedent of this Court and conflict with the decisions of several other Courts of Appeals. The Court applied a deferential level of review rather than strict scrutiny. The Court of Appeals rejected the least restrictive means test of "narrow tailoring" in favor of its own, newly adopted test that "an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest." 837 F.2d at 1276. This test was adopted in part because of the Court's expressed opinion that "sexually oriented expression falls into a category of speech subject to less than full First Amendment protection." Id. Finally, the Court held that in assessing whether the Ordinance provided "a reasonable opportunity to open and operate . . . within the city,"[19] means that alternative sites need not be commercially viable. 837 F.2d at 1277.

This Petition for Certiorari is filed in order to seek review by this Court of the apparent conflict between the decision of the Court below and the decisions of this Court, and the substantial conflict that exists between the decision of the Court below, and decisions of the Seventh and Ninth Circuit Courts of Appeals. These conflicts and the questions presented are substantial and important because of the regularity with which issues concerning the constitutionality of legislative enactments restricting and regulating the operation of adult business are litigated.

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[19] *City of Renton*, 106 S.Ct. at 932.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION IN BOOS V. BARRY, 108 S.CT. 1157 (1988) WHICH REQUIRES STRICT SCRUTINY REVIEW WHERE THE PROFFERED JUSTIFICATION FOR A REGULATION IS THE PSYCHOLOGICAL DAMAGE ASSOCIATED WITH BEING EXPOSED TO SPEECH.

The findings of Ordinance 86-323, which the City found justified the Ordinance's regulation of the proximity of adult lounges to residences, churches and schools, all related to the alleged "dehumanizing influence on persons attending churches or schools in the surrounding areas."[20] Further, the sole basis revealed by the trial testimony for requiring separation from residences, schools and churches was, once again, the alleged "dehumanizing influence."[21]

The Court below held that the City Council's determination that adult lounges exert a "dehumanizing influence" was a sufficiently substantial governmental interest to justify the regulations imposed by the Ordinance, given the deferential review afforded time, place or manner regulations of speech. However, the Court below did not have the benefit of this Court's recent explanation of its definition of a content-neutral statute.

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[20]See findings set forth on page 4, supra. *Webster's New Collegiate Dictionary*, 1981, defines "dehumanizing" as: "To divest of human qualities or personality.

[21]See page 5, supra.

In *Boos v. Barry*, 108 S.Ct. 1157, 1163 (1988), the Court explained its holding in *Renton* where it defined a content-neutral statute. Justice O'Connor, speaking for the Court, said:

> To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Applying this principle to the case at hand, as the Court did in *Boos*, leads to the inescapable conclusion that the regulations of Ordinance 86-323, limiting the proximity of adult lounges to schools, churches and residences, are content based. Paraphrasing the Courts decision in *Boos*:

> Respondents do not point to the 'secondary effects' of [adult lounges in proximity to schools, churches, and residences]. They do not point to congestion, to interference with ingress or egress, to visual clutter, or the need to [reduce crime from a single business located nearby]. Rather, they rely on the need to protect the dignity of [children and persons living nearby] by shielding them from speech that [they find offensive]. This justification focuses *only* on the content of the speech and the direct impact the speech has on [persons who are not actually exposed to it but know it is occurring]. The emotive impact of speech . . . is not a 'secondary effect.'

Petitioners submit that there is a functional equality between "psychological damage" and "dehumanizing influence." Accordingly, the regulations of Ordinance 86-323, which are justified by this content-based classifica-

tion must, as in *Boos*, be subjected to the most exacting scrutiny. The Petition herein should be granted so that the case may be remanded to the District Court in order that the regulations may be subjected to the appropriate standard of review.

II. THE COURT OF APPEALS' DECISION, WHICH EXAMINES HOUSTON'S ORDINANCE UNDER THE STANDARD OF REVIEW AFFORDED TIME, PLACE OR MANNER REGULATIONS, CONFLICTS WITH THIS COURT'S DECISIONS WHICH REQUIRES "STRICT SCRUTINY" REVIEW WHERE THE BURDEN ON THE SPEECH ACTIVITY IS MORE THAN INCIDENTAL.

When considering passage of Ordinance 86-323, the Houston City Council had before it the report of the Committee On The Regulation Of Sexually Oriented Businesses, dated March 5, 1986.[22] With respect to the availability of alternative locations, that report concluded that there were 60 sites within the City where existing adult lounges could relocate and for any new sexually oriented businesses which might seek to open.[23]

With this as the only evidence before it, the City passed this ordinance which required the relocation of fifty-eight percent (58%) of the adult lounges in the City of Houston into a limited number of sites (60), none of which were shown to be commercially viable or available. Petitioners submit that this burden imposed upon the protected speech activities of adult lounges is much more than

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[22]SRE 3.

[23]SRE 3, p. 10.

merely incidental, it is substantial. As a result, the level of scrutiny utilized by the Court below is inappropriate. Strict scrutiny is required.

This Court has said that zoning regulations that have "the effect of suppressing, or greatly restricting access to lawful speech" are unconstitutional. *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) n. 35; *Renton*, supra, at 932. Implicit in *Young* was the conclusion that a zoning ordinance "that does not significantly reduce the number or accessibility of theatres presenting particular films, stifles no expression." *Young*, at 81, n. 4 (Powell, J., concurring). However, the Court's footnote 35 noted:

> The situation would be quite different if the ordinance had the effect of suppressing or greatly restricting access to lawful speech.

It should be noted that in *Young*, existing businesses were not affected by the zoning regulations found constitutional there. The ordinance operated only prospectively. In *Adult Bookstore, et al. v. City of Fresno*, 758 F.2d 1352 (9th Cir. 1985), the Court, in granting a preliminary injunction against the enforcement of an adult business zoning ordinance, noted, "[t]here are apparently no appellate cases since *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), which have upheld the constitutionality of an ordinance which requires the relocation of existing adult-type businesses. See also *Ebel v. City of Corona*, 767 F.2d 635, 639 (9th Cir. 1985).

In the instant case, the Court's apparent reliance on *Renton* for the proposition that adequate sites are avail-

able is misplaced.[24] In *Renton*, no adult businesses were in existence at the time the ordinance was enacted. Accordingly, the ordinance only acted prospectively.

Petitioners submit that the burden imposed by this restriction is substantial and therefore the Fifth Circuit utilized the wrong standard of review. Strict scrutiny was required.

III. THE COURT OF APPEALS' REJECTION OF THE LEAST RESTRICTIVE MEANS TEST TO DETERMINE WHETHER AN ORDINANCE IS NARROWLY TAILORED IS IN APPARENT CONFLICT WITH THIS COURT'S DECISION IN CITY OF WATSEKA V. ILLINOIS PUBLIC ACTION COUNCIL, 107 S.CT. 919 (1987).

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L.Ed.2d 291, 106 S.Ct. 925, 931 (1986), this Court held that a content-neutral time, place or manner regulation of speech must be " 'narrowly tailored' to affect only that category of [business] shown to produce the unwanted secondary effects . . . "

In *City of Watseka v. Illinois Public Action Council*, — U.S. —, 93 L.Ed.2d 972, 107 S.Ct. 919 (1987), reh. den.,

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[24]The City of Renton covers 15.3 square miles and had a 1981 population of 32,200. The set aside land in Renton for adult theatres would have accommodated well over 400 theatres and surrounding parking lots. In the instant case, the evidence establishes that the City of Houston is the fourth largest city in the United States, covering approximately 573 square miles. Based upon the evidence considered by the City Council, only 60 possible locations would exist for adult lounges. In other words, Houston, a city approximately 34 times the size of Renton, would have only approximately fifteen persent (15%) of the number of potential locations available in the City of Renton for existing businesses to relocate to and for new business locations as well.

107 S.Ct. 1389 (1987), this Court summarily affirmed the decision of the Court of Appeals for the Seventh Circuit which held the issue of whether an ordinance restricting First Amendment rights was "narrowly tailored" must be determined by the least restrictive means test. Despite Petitioners' urging, the Court below rejected the "least restrictive means" test in favor of a test that is much more deferential to the governmental choice of means (does it effectively promote the government's stated interest) and effectively ignores the mandate in *Renton* that the means chosen to accomplish a substantial governmental purpose be "narrowly tailored."

The Fifth Circuit's rejection of the "least restrictive means" test of "narrowly tailored" is in apparent conflict with the decision of this Court in *Watseka*. In *Hicks v. Miranda,* 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975), this Court held that lower courts are bound by summary decisions of the Supreme Court until such time as the Court informs them they are not. See *Mandell v. Bradley,* 432 U.S. 173, 53 L.Ed.2d 199, 97 S.Ct. 2238 (1977). Crucial to and at the core of the Seventh Circuit's decision in *Watseka* was the holding that the standard of review for time, place or manner regulations requires further consideration of whether " . . . there is a less restrictive alternative to a challenged regulation." For, if there is, " . . . then the ordinance is not as precise and narrowly drawn as it could be, and the regulation unnecessarily interferes with First Amendment rights." *Watseka,* 796 F.2d at 1553. The summary affirmance in *Watseka* came over the dissent of Justices White, Burger and O'Connor who argued that the least restrictive means test had never been employed in the analysis of time, place

or manner regulations on speech. Based upon the dissent in the summary affirmance, it seems apparent that the measuring of whether an ordinance is "narrowly tailored" by the "least restrictive means" test was within the reach and content of the summary action and the question of the applicability of the "least restrictive means" test was squarely presented on appeal.

While the Court below opined that adopting the "least restrictive means test" would be "breaking new ground," 841 F.2d 108, a careful review of this Court's opinions would suggest otherwise. In *Watseka*, the Court identified the decisions of this Court which have required and employed this test in similar settings. 796 F.2d at 1553. There the Court said:

> For example, in *Renton* Justice Rehnquist noted that "the Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed. 2d 671 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975)." *Renton* at — U.S. —, 106 S.Ct. at 930. *See also Clark*, 468 U.S. at 296, 104 S.Ct. at 3070 ("the regulation narrowly focuses on the Government's substantial interest"); *Vincent*, 466 U.S. at 808, 104 S.Ct. at 2130 ("incidental restriction on expression" must be "narrowly tailored to serve [the government's legitimate] interest"); *Schad*, 452 U.S. at 68-71, 101 S.Ct. at 2182-84; *Grayned v. City of Rockford*, 408 U.S. 104, 116-17, 92 S.Ct. 2294, 2303-04, 33 L.Ed.2d 222; *Mosley*, 408 U.S. at 98-99, 92 S.Ct. at 2291-92.

Petitioners respectfully submit that the summary affirmance in *Watseka* was binding on the Court below with respect to the application of the least restrictive means test.

IV. THE COURT OF APPEALS' REJECTION OF THE LEAST RESTRICTIVE MEANS TEST TO DETERMINE WHETHER AN ORDINANCE IS NARROWLY TAILORED IS IN CONFLICT WITH POST-RENTON DECISIONS OF THE SEVENTH AND NINTH CIRCUIT COURTS OF APPEALS.

The Court of Appeals' decision rejecting the "least restrictive means" standard of review for determining whether an ordinance is "narrowly tailored" is in conflict with post-*Renton* decisions of the Seventh Circuit, in *Watseka,* and the Ninth Circuit in *Tollis, Inc. v. San Bernardino, County et al.,* 827 F.2d 132 (9th Cir. 1987) and *Walnut Properties, Inc. v. City of Whittier,* 808 F.2d 1331 (9th Cir. 1987).

Immediately post-*Renton,* in *Walnut Properties, Inc.,* the Ninth Circuit remanded the case to the trial court, in light of *Renton,* to determine whether the restrictions of the ordinance were greater than essential to the furtherance of the asserted governmental interest. The effect of this decision was to adopt the less restrictive means test. More explicitly, in *Tollis, Inc. v. San Bernardino County,* the Ninth Circuit said:

> At a minimum, however, there must be a logical relationship between the evil feared and the method selected to combat it. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80 (1976) (Powell, J., concurring) (a regulation's 'incidental restriction . . .

> First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest.') quoting *United States v. O'Brien*, 39 U.S. 367, 377 (1968). The County must show that in enacting the particular limitations it places upon adult theaters, it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects. See *Renton*, 106 S.Ct. at 931; *Walnut*, 808 F.2d at 1335.

The Fifth Circuit rejected the analysis of each of these post-*Renton* decisions and, instead, adopted a totally new test. The test adopted by the Court below clearly is inadequate to safeguard and protect First Amendment concerns. The test would find that " . . . an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest." 837 F.2d at 1276. Stated another way, " . . . the purposes of the ordinance . . . 'would be achieved less effectively' but for the regulation . . . " Id. Petitioners respectively submit that this test allows the governmental entity a limitless choice of means without any effective judicial review to ensure that the regulation is not a mask for regulation of content. While the test adopted by the Court of Appeals does require tailoring, i.e. it must promote the government's stated interest, it does not require "narrow tailoring."

At a minimum, Petitioners submit that "narrow tailoring" "requires the government to show both that there is a significant relationship between the regulation and the governmental interest . . . ('actual connection between the restriction and the served interest'), *and* that less restrictive alternatives are inadequate to protect the governmental interest." *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1554 (7th Cir. 1986). The

Ninth Circuit's two recent decisions, have stated the test to be that, at a minimum, "there must be a logical relationship between the evil feared and the method selected to combat it." *Tollis, Inc. v. San Bernardino County, et al.*, 827 F.2d 1329 (9th Cir. 1987). See also *Walnut Properties, Inc. v. City of Whittier,* 808 F.2d 1331 (9th Cir. 1987).

In the context of the case before the Court, the regulations and the evidence do not satisfy any of these tests. The findings of the Ordinance, when considered in context with the evidence at trial, fail to provide any basis for restricting the location of the businesses of Petitioners.

It is clear that the less restrictive alternative (removing the visual material itself) is adequate to protect the governmental interest, i.e. the "dehumanizing influence on persons attending churches or schools in the surrounding areas" of the signage and exterior condition. To paraphrase the words of the Court in *Tollis, Inc. v. San Bernardino County, et al.,* supra, there is no logical relationship between the evil feared (exposure to signage and exterior appearance) and the method selected to combat it (separation by 750 feet) when the ordinance specifically requires the removal of the signage and prescribes the exterior condition for the premises.

It is respectively submitted that the test adopted by the Fifth Circuit, on its face, and as applied to the facts of the instant case, does not comply with the test announced by this Court in *Renton* that an ordinance be "narrowly tailored," or, in the alternative, that this Court needs to resolve the conflict that exists between the Court below and other Courts of Appeals on this issue.

V. THE HOLDING OF THE COURT OF APPEALS THAT SITES AVAILABLE TO BUSINESSES FOR PURPOSE OF RELOCATION AND LOCATION NEED NOT BE COMMERCIALLY VIABLE IS IN CONFLICT WITH AT LEAST THREE OF THIS COURT'S DECISIONS.

The Court below rejected Petitioners' claim that the Houston ordinance does not leave open, ample, alternative channels of communication, premised upon a determination that the decision in *Renton* means that alternative sites need not be commercially viable. 837 F.2d at 1277. Petitioners submit that this holding is in direct conflict with the decisions in *Young v. American Mini Theatre,* 427 U.S. 50; *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61; and *Renton v. Playtime Theatres,* 475 U.S. 41.

In *Renton,* the Court's decision was premised upon the specific finding that the area set aside for the location of adult businesses consisted of "520 acres of land . . . of '[a]mple, accessible real estate,' including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways and roads.' " 105 S.Ct. at 932. Here, Petitioners respectfully submit that if the locations available to them need not be commercially viable, they have effectively been denied "a reasonable opportunity to open and operate . . . within the city." *Renton,* 106 S.Ct. at 932.

Courts that have considered the question of "reasonable access" and "available locations" have done so in the context of the practical effect of such restrictions. In *Purp'e Onion, Inc. v. Jackson,* 511 F.Supp 1207 (ND Ga. 1981), the Court found that sites the city contended were "avail-

able'' and ''adequate'' were either ''unavailable, unusable, or so inaccessible to the public that for all practical considerations, they amounted to no locations.'' 511 F.Supp at 1217. In *Basiardanes v. City of Galveston,* 682 F.2d 1203 (5th Cir. 1982), the Court rejected the view of the District Court that the drawbacks of opening a movie theatre in an industrial zone were simply the ''reasonable economic burden that befalls some activity in every land use program,'' the Court concluding:

> [W]hen a claim of suppression of speech is raised, an exclusive focus on economic impact is improper. "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *American Mini Theatres,* 427 U.S. at 78, 96 S.Ct. at 2456 (Powell, J. concurring). 682 F.2d at 1214.

The Court went on to hold that it was error not to consider the consequences to speech of confining adult theatres to ''the most unattractive, inaccessible, and inconvenient areas of a city'' citing *Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328, 336 (5th Cir. 1981) (holding that restriction of abortion facilities to undesirable areas places a significant burden on a woman's decision to have an abortion).

Petitioners respectfully submit that the decision in *Renton* did nothing to change this view of the law. Petitioners are ready, willing and able to complete in the marketplace for available, *suitable retail space;* however, where the restrictions of the ordinance deny access to such space, Petitioners contend that they have been effectively denied access to the marketplace.

In *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 78 (1981) Justice Blackmun, in his concurring opinion, opined

that because of the variety of "geographic configuration and types of commerce among neighboring communities," these issues must be resolved "on a case by case basis," giving deference to the sensitive First Amendment concerns. Any rule must focus on "the effect of [the] ordinance upon freedom of expression." *Young v. American Mini Theatres*, 427 U.S. 50, 78 (1976) (Powell, J., concurring). Courts must be alert to the possibility of cities using the zoning power as a pretext for suppressing expression. Id, at 84.

Petitioners respectfully submit that the rule announced by the Fifth Circuit would allow courts to ignore the actual effect of restrictive zoning laws on protected First Amendment speech, thereby denying judicial review of governmental attempts at suppression of protected communication.

VI. THE HOLDING OF THE COURT OF APPEALS THAT PARTIALLY NUDE DANCING IS NOT ENTITLED TO FULL PROTECTION OF THE FIRST AMENDMENT IS IN APPARENT CONFLICT WITH THE COURT'S OPINIONS IN DORAN V. SALEM INN, INC., 442 U.S. 911, AND SCHAD V. BOROUGH OF MT. EPHRAIM, 452 U.S. 61, AND IS IN DIRECT CONFLICT WITH DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS.

The only challenge raised in this lawsuit is the constitutionality of the ordinance as applied to partially nude dancing.[25]

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[25]The report of the Committee On The Regulation Of Sexually Oriented Businesses, dated March 5, 1986 (SRE 3), makes

(Continued on following page)

For over a decade, courts have considered topless dancing to be expression subject to constitutional protection within the free speech and press guarantees of the First and Fourteenth Amendments. See *Doran v. Salem Inn, Inc.*, 442 U.S. 922, 932-33 (1975); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *Chase v. Davelaar*, 645 F.2d 735, 737 (9th Cir. 1981).

In *Consolidated Edison Co. of New York v. Public Service Comm'n of New York*, 447 U.S. 530, 65 L.Ed.2d 319, 100 S.Ct. 2326 (1980), Justice Powell, writing for the majority, underlined the fact that nonobscene erotic speech is entitled to the same protection as all other speech by pointing to his and Justice Brennan's opinions in *Federal Communications Comm'n v. Pacifica Foundation*, 438 U.S. 726, 761-763, 57 L.Ed.2d 1073, 98 S.Ct. 3026 (1978). In *Pacifica*, Justice Powell stated:

> I do not subscribe to the theory that the justices of this court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection.

Justice Brennan stated in *Pacifica*:

> For the second time in two years, see *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the court

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(Continued from previous page)

it abundantly clear that the impact of Ordinance No. 86-323 is to add sexually oriented businesses that sell alcoholic beverages, i.e. businesses that present partially nude dancing (defined in the ordinances as adult lounges), to a previously existing ordinance. The previously existing ordinance, and the restrictions imposed on the sexually oriented businesses enumerated therein, are not challenged here. The only challenge raised is to the applicability of this ordinance to partially nude dancing.

> refuses to embrace the notion, completely antithetical to the basic First Amendment values, that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five members of this court. 438 U.S. at 762.

More recently, the Ninth Circuit, in two separate decisions, made it abundantly clear that topless dancing is entitled to the same degree of protection afforded speech clearly at the core of First Amendment values. *Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1058 (9th Cir. 1986); *BSA v. King County,* 804 F.2d 1104 (9th Cir. 1986).

The statement of the Court below that ". . . sexually oriented materials are due less protection than other forms of expression . . .," 837 F.2d at 1274, simply does not comport with the existing body of case law[26] and would, taken to its logical extreme, deny the totality of First Amendment protection to many contemporary art forms. Taken to its rational conclusion, any depiction or portrayal of the female breast, or male or female buttocks or genitalia in paintings, statues, stage presentations, or musical and operatic works would render the artistic ma-

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[26]The Court of Appeals' decision elevates a statement of dictum, expressed in the plurality opinion in *American Mini Theatres, Inc.,* to a "holding" of the Supreme Court. That dictum suggested that sexually oriented entertainment is entitled to less constitutional protection than other types of expression. That statement was rejected by four dissenting justices, and Justice Powell who refused to join Part III of the plurality opinion in which the statement was written. He wrote: "I do not think we need reach, nor am I inclined to agree with, the holding in Part III (and supporting discussion) that nonobscene erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73. Instead, Justice Powell applied the full force of the First Amendment when he analyzed the Detroit ordinance under established First Amendment principles.

terials "sexually oriented" and, thus, deny them full protection of the First Amendment. Even if somehow limited, the application of any such rule would place judges and juries in the position of evaluating, with no objective standards, the relative artistic merits of any performance or work of art to determine if it was sufficiently sexually oriented to deprive it of full constitutional protection.

VII. DEFINING THE PROPER TEST TO BE USED TO ANALYZE AND DETERMINE THE CONSTITUTIONALITY OF LAWS IMPOSING RESTRAINTS ON THE LOCATION AND OPERATION OF BUSINESSES PRESENTING MATERIALS PROTECTED BY THE FIRST AMENDMENT IS AN EXTREMELY IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH REQUIRES RESOLUTION BY THIS COURT.

Since *Young*, cities and towns across the country have struggled to regulate the location of adult businesses within their borders. Prior to *Renton*, only a few of their zoning ordinances had been upheld—and only one federal circuit had sustained the validity of a *Young*-style adult theatre ordinance on the merits.[27] Most such ordinances

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[27] *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980). *See also Northend Cinema, Inc. v. City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978); *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (2d Dist.), vacating 189 Cal.Rptr. 12 (2d Dist. 1983); *County of Sacramento v. Superior Court*, 137 Cal.App.3d 448, 187 Cal.Rptr. 154 (3d Dist. 1982); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979) (statutory prohibition against two adult establishments in one building tantamount to zoning and upheld under *Young*), *cert. denied*, 447 U.S. 929 (1980); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (appeal from preliminary injunction).

were struck down because of an actual or practical unavailability of alternative sites,[28] an intent to inhibit,[29] or the effect of inhibiting,[30] one or more existing or intended adult establishments; and an intent to suppress the content of the material offered.[31]

Subsequent to *Renton*, cities and towns vigorously renewed their efforts to enact restrictive zoning regulations in light of the Court's holding that they may rely on the experiences of other cities. This new flurry of litiga-

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[28]*E.G. Basiardanes v. City of Galveston*, 682 F.2d 1203, 1209, 1212, 1214 (5th Cir. 1982); *Alexander v. City of Minneapolis*, 531 F.Supp. 1162, 1168-69 (D. Minn. 1982), *aff'd*, 698 F.2d 936 (8th Cir. 1983); *CLR Corp. v. Henline*, 520 F.Supp. 760, 767 (W.D. Mich. 1981), *aff'd*, 702 F.2d 637 (6th Cir. 1983); *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207, 1209, 1214, 1215-17 (N.D. Ga. 1981); *E&B Enterprises v. City of University Park*, 449 F.Supp. 695, 697 (N.D. Tex. 1977); *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696, 701-702 (M.D. Fla. 1978). *Cf. Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d at 1213-15 (preliminary injunction denied where theatre owner failed to show that alternative sites were not available); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 336 (5th Cir. 1981) (re abortion clinics); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 96-99 (6th Cir. 1981) (ordinance totally prohibited adult theatres).

[29]*E.g., Tovar v. Billmeyer*, 721 F.2d 1260, 1264-65 (9th Cir. 1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1348-49 (9th Cir. 1982); *Basiardanes v. City of Galveston*, 682 F.2d at 1216; *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659, 661-662 (9th Cir. 1981). *See also Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1119, 1124-25 (1st Cir. 1981).

[30]*E.g., Alexander v. City of Minneapolis*, 531 F.Supp. at 1170; *Purple Onion, Inc. v. Jackson*, 511 F.Supp. at 1212, 1217, 1224. *Cf. Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172, 1175 (5th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978).

[31]*E.g., Purple Onion, Inc. v. Jackson*, 511 F.Supp. at 1210; *E&B Enterprises v. City of University Park*, 449 F.Supp. at 697. *Cf. Bayou Landing, Ltd. v. Watts*, 563 F.2d at 1175.

tion has exposed several questions left unanswered by the Court's decision in *Renton*, questions upon which the Circuits are now sharply divided as discussed herein. Moreover, for the first time, this case presents the Court with the question of whether a city may amortize existing businesses out of existence in the face of a record that ignores the city's own experience and leaves few, if any, alternative sites.

This case demonstrates only too well the problems faced by businesses seeking to offer their First Amendment protected communication in communities motivated to censor through zoning. The Fifth Circuit has approved a standard of review that relegates artistic material which includes sexuality to a lesser protected status, ignores the reality that restrictions imposed on location may in fact eliminate a form of protected speech from the community and gives only token and totally deferential review to a legislative fact finding process that is preordained in its outcome.

Petitioners respectfully submit that the decision of the Fifth Circuit invites courts to abandon their role as a guardian and protector of First Amendment rights. Freedom of speech, our most cherished constitutional right, must not be abandoned to majoritarian decision makers.

This case presents questions of extraordinary importance to all First Amendment activities which do not meet with the approval of the majority of our elected representatives. While cities need flexibility for experimentation and innovation in the vital area of land use regulation, they cannot be allowed to legislate so broadly as to have the power to substantially abrogate First

Amendment rights. The lower courts need and deserve thoughtful guidance in defining the standard of review in cases such as the case at hand in order that they may fulfill their role as protector against the excesses of legislative action.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX A

SDJ, INC., d/b/a Sugar Babes, et al.,

Plaintiffs-Appellants,

v.

The CITY OF HOUSTON, et al.,

Defendants-Appellees.

No. 86-2735.

United States Court of Appeals,
Fifth Circuit.

Feb. 10, 1988.

Rehearing and Rehearing En Banc
Denied March 15, 1988.*

Owners of topless bars filed action challenging city ordinance imposing licensing and zoning restrictions upon sexually oriented businesses. The United States District Court for the Southern District of Texas, Gabrielle K. McDonald, J., 636 F.Supp. 1359, upheld ordinance and appeal was taken. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that (1) city ordinance imposing licensing and zoning restrictions upon sexually oriented businesses, including topless bars, did not violate First Amendment; (2) city ordinance did not violate equal protection or due process clause; and (3) city's enactment of ordinance did not exceed authority given it in enabling statute.

Affirmed.

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*Opinion on rehearing, 841 F.2d 107.

Karrie Key, Joel M. Androphy, David H. Berg, Berg & Androphy, Houston, Tex., for SDJ, Inc., et al.

Jack R. Burns, Bellevue, Wash., for M.E.F. Enterprises, Inc. & MKD Enterprises.

Robert J. Collins, Sr. Asst. City Atty., Gilbert D. Douglas, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The City of Houston enacted a detailed ordinance imposing licensing and zoning restrictions upon sexually oriented businesses. The owners of 23 topless bars subject to the regulations filed suit in federal district court lodging a number of facial attacks on the Ordinance. The district court, with three exceptions not complained of here, upheld the Ordinance. *See SDJ, Inc. v. City of Houston,* 636 F.Supp. 1359 (S.D.Tex.1986).

The owners press numerous issues on appeal. First, they challenge the Ordinance on first amendment grounds, claiming that the City failed to prove that it had a substantial interest in regulating their businesses, that the Ordinance is "narrowly tailored" to the City's interest in regulation, and that the Ordinance leaves open ample alternative channels of communication. The owners also claim the Ordinance delegates too much discretion to an administrative officer, and that its signage provisions are impermissibly intrusive. Second, the owners challenge the

Ordinance on fifth and fourteenth amendment grounds, arguing that the Ordinance constitutes a taking of property and is overbroad and vague, thus violating plaintiff's due process rights. Third, the owners challenge the Ordinance on equal protection grounds, claiming that the Ordinance is unconstitutional because it regulates only certain forms of sexually oriented businesses, is not gender neutral, and imposes signage regulations that do not apply to the rest of the business community. Finally, the owners challenge the Ordinance on state law grounds claiming that the Ordinance conflicts with preemptive Texas state statutes regulating businesses at which alcoholic beverages are sold and exceeds the authority of the state enabling act. We reject these contentions and affirm.

I

In 1982, the City of Houston formed a special committee to study the effects of sexually oriented businesses with in the City and to determine what regulation was necessary. The committee conducted public hearings, studied the regulations and experiences of other cities, and concluded that sexually oriented businesses can exert a dehumanizing influence on persons attending churches or schools, can contribute to an increase in criminal activity, can contribute to the impairment of character and quality of residential neighborhoods, and, when concentrated in one area, can contribute to a decline in value of surrounding property.

The Houston City Council adopted the committee's report and proposed ordinance in December, 1983. The ordinance, No. 83-1812, regulated the location, decor, and

signage of all sexually oriented businesses except adult bookstores, adult movie theatres, and sexually oriented businesses licensed to sell alcoholic beverages. A state enabling statute, TEX.REV. CIV.STAT.ANN. art. 2372w, prohibited the city's regulation of the excepted businesses.

In 1985, however, the Texas legislature amended the enabling statute to delete the prohibition against regulating businesses licensed to sell alcoholic beverages. The prohibition against regulating adult book stores and movie theatres was not changed. After the amendment, the City of Houston reconvened the City Council's Committee on Sexually Oriented Businesses to study whether sexually oriented businesses licensed to sell alcoholic beverages had the same deletorious effects on the community as did those businesses regulated under the original ordinance. Again public hearings were held, and the committee filed with the City Council a supplemental report concluding that sexually oriented businesses serving alcohol had the same effects as the businesses that did not serve alcohol.

In March, 1986, the City Council adopted the supplemental report and enacted Ordinance No. 86-323. The Ordinance subjects certain businesses, including topless bars, to licensing requirements. A business cannot qualify for a license if it is located within 750 feet of a church, school, or licensed day care center, if it is located in an area that is more than 75% residential, or if it is located within 1000 feet of another sexually oriented business. The Ordinance also imposes restrictions on the exterior decor and signage of those businesses, limiting the number and verbiage of signs and requiring buildings to be painted achromatically. The Ordinance also contains detailed pro-

visions delineating application, revocation, suspension, and appeal procedures. Plaintiffs challenge this second Ordinance.

II

In *City of Renton v. Playtime Theatres, Inc.*,[1] the Supreme Court tested a city zoning provision similar to the Houston ordinance. The City of Renton prohibited sexually oriented businesses from locating near churches, residential zones, schools, and parks.[2] The Court upheld the ordinance, finding it to be a valid time, place or manner restriction. The Court submitted the Renton ordinance to the analysis reserved for content-neutral restraints, although the ordinance marked businesses by the content of their product.[3]

The Court provided two reasons for applying more deferential scrutiny. First, the ordinance could be treated as content-neutral because its purpose was not to curb speech having a particular content, but was rather to curb the *effects* of certain businesses.[4] As long as the City's "*predominant* concern" was to control the negative secondary effects of sexually oriented businesses, the Renton ordinance could draw distinctions between kinds of busi-

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1. 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *see also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion).

2. *See City of Renton*, 106 S.Ct. at 926-27.

3. *See id.* at 929.

4. *See id.*

nesses on the basis of their unique effects without engaging in content-based regulation.[5]

Second, the Court recognized that the conduct of "businesses that purvey sexually explicit materials" receives less first amendment protection than other forms of protected activity. As the Court put it, " 'society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . .' "[6]

This reasoning applies equally to the Houston Ordinance. The type of activity it regulates is the same as in *City of Renton.* Likewise, the findings of the Houston council as to the secondary effects of sexually oriented businesses satisfy us, as they did the district court, that the city's predominant concern was with secondary effects and not the content of expression itself. Thus, we test the constitutionality of the Ordinance, by the time, place, and manner of its regulation.

Applying this test requires the City to prove that the Ordinance is narrowly tailored to serve a substantial interest and that it leaves open alternative channels of communication.[7] Plaintiffs contend that the district court erred in finding that the City had met this burden because, although a city can rely on validated studies of other cities

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5. *See id.* at 930.

6. *Id.* at 929-30 n. 2 (quoting *American Mini Theatres,* 427 U.S. at 70, 96 S.Ct. at 2452); *see also FCC v. Pacifica Foundation,* 438 U.S. 726, 746, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978) (plurality opinion).

7. *City of Renton,* 106 S.Ct. at 930.

to establish its own interest,[8] here the City of Houston failed to present any evidence that it had relied on such studies or had conducted its own valid study. They contend that the evidence the City did present consisted of "mere conclusory and speculative findings unsupported by empirical evidence."

In determining the appropriate level of findings here, we note that the "legislative" exercise of police power, in an area such as zoning, is subject to deferential review.[9] An inquiry into the actual purposes of a zoning regulation is a difficult and intrusive undertaking for courts. Ordinarily a zoning regulation comports with due process if "there was any possible rational basis for legislation."[10] This deference serves the interest of federalism and relatedly, reflects the limits of the judicial role.

The first amendment of course alters our role, and our review necessarily becomes more intense to the extent zoning affects protected speech. Under the rigorous scrutiny given content-based speech restrictions, for example, a state's finding that certain speech carries a "clear and present danger" may not alone carry the day; vindication of values secured by the first amendment requires courts to make a fresh inquiry into the likely effect of the speech.[11] While sexually oriented materials are due less

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8. *See id.* at 931.

9. *See Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir. 1986) (en banc), *cert. denied*, — U.S. —, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986).

10. *Id.* at 481.

11. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44, 98 S.Ct. 1535, 1543-44, 56 L.Ed.2d 1 (1978).

protection than other forms of expression, their regulation by zoning nonetheless triggers a more intensive level of scrutiny.

It is true that the effect on speech here is said to be incidental to a regulation aimeed at the secondary effects of a business whose activities are within the legitimate scope of the state's police power. Yet, unlike our review under a standard of rationality, we will not hypothesize such an objective or accept a naked assertion. Rather, we intrude into the regulatory decision process to the extent that we insist upon objective evidence of purpose—a study or findings. Insisting upon findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content. That is, evidence of legitimate purpose is supported by proof that secondary effects actually exist and are the result of the business subject to the regulation. At the same time, it is apparent that as we increase the required precision in findings, we increasingly encounter the difficulties we found unacceptable in *City of College Station.* Our task in setting the level of review is to strike for that point of equilibrium that vindicates first amendment values at the least cost to a state's decisional arrangements.

Thus, as the Court explained in *City of Renton,* a city may establish its "substantial interest" in the regulation by compiling a record with evidence that it may be "reasonably believed to be relevant to the problem that the city addresses."[12] We do not ask whether the regulator subjectively believed or was motivated by other concerns,

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12. *City of Renton,* 106 S.Ct. at 931.

but rather whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities. This level of scrutiny best accomodates the need to ensure proper purposes with the limited competence of courts to discern ephemeral legislative motivations.

The record reflects that the City Council carefully considered the relationship between sexually oriented businesses and neighborhood effects. The City formed a special Committee on Sexually Oriented Businesses, which heard public testimony from both supporters and opponents of the Ordinance, as well as experts. The committee also considered studies conducted by other cities such as Detroit, Boston, Dallas, and Los Angeles. While it may not be enough simply to tailor one ordinance to another that has survived judicial review, we are persuaded that the City Council considered those studies themselves and not merely the ordinances for which the studies provided support. Although the 1986 supplemental report relates no empirical evidence of the effects of topless bars, that report incorporates the 1982 report, which does refer to topless bars. We are persuaded that the City met its burden under *City of Renton* to establish that there was evidence before it from which the Council was entitled to reach its conclusion and was "relevant to the problem that the city addresses."[13] The district court did not err in finding that the City had proved a substantial interest in the regulation of businesses subject to the Ordinance.

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13. *Id.* at 931.

For these same reasons the Ordinance also meets the standard we applied in a pre-*Renton* decision, *Basiardanes v. City of Galveston.*[14] In *Basiardanes*, we reversed the district court's finding that a Galveston sexually oriented business ordinance was constitutional, holding that the city had failed to prove a justifiable interest in the regulation because "there is no evidence in the record that the Galveston City Council passed Ordinance 78-1 after careful consideration or study of the effects of adult theaters on urban life."[15] As we have explained, the record in this case supports exactly the opposite conclusion.

Plaintiffs also argue that the City has failed to prove that the restrictions imposed by the Ordinance are "narrowly tailored" to meet these interests.[16] According to plaintiffs, there is no actual connection between the distancing restrictions of the Ordinance and the City's interest in regulation. The argument continues that the City must prove that 750 feet, as opposed to some other distance, is necessary to serve the City's interest.

At the outset, we note that although the Supreme Court has required "narrow tailoring" even within the area of content-neutral regulations,[17] it is not clear what

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14. 682 F.2d 1203 (5th Cir. 1982).

15. *Id.* at 1215.

16. *City of Renton*, 106 S.Ct. at 931.

17. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968) (holding that a content-neutral restraint is valid only if "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"); *see also Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980).

level of exactitude is appropriate.[18] In *City of Renton*, opponents of the ordinance contended that the city failed to prove narrow tailoring because the city had not demonstrated that its method of regulation, concentrating the businesses away from other uses, was more appropriate than dispersing the businesses from each other. The argument did not persuade the *City of Renton* court. The Court instead found that the choice was within the ambit of Renton's legislative discretion:

> "It is not our function to apprise the wisdom of [the city's] decision to require adult theatres to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[19]

In decisions dealing with local restrictions on political and religious solicitation, other circuit courts have struggled to define the narrowness required in an otherwise valid time, place, or manner regulation. At one extreme, the Third Circuit decided that any narrowness requirement is satisfied so long as the regulation meets the second-prong of the content-neutral analysis: that it leaves ample alternative channels of communication.[20] At the other extreme, the Eighth Circuit demanded that a time, place, or manner restraint be sufficiently narrow that it

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18. *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U.Chi.L.Rev. 46 (1987) (discussing various levels of review applied to content-neutral regulations).

19. *City of Renton*, 106 S.Ct. at 931 (quoting *Young v. American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. at 2452).

20. *See Tacynec v. City of Philadelphia*, 687 F.2d 793, 797-98 (3d Cir.1982).

uses the "least restrictive means" available to achieve the government's interest.[21] The Seventh Circuit has adopted the Eighth Circuit's approach.[22]

In light of *City of Renton*, we decline to apply these standards to this case. The Third Circuit's approach seems inconsistent with the Court's explicit discussion of *both* narrow tailoring and alternative channels of communication. The emphasis on "least restrictive means" adopted by the Eighth and Seventh Circuits is also inappropriate. First, it fails to recognize—as the *Renton* opinion noted—the importance of permitting cities to experiment with means to remedy unwanted secondary effects. Indeed, the Eighth Circuit's test may have been precluded by the Supreme Court's decision in *United States v. Albertini*.[23] In approving a time, place or manner regulation applying to military bases, the Court noted:

> Nor are [content-neutral] regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. [*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 3072, 82 L.Ed.2d 221 (1984).] Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under [*United States v.*] *O'Brien*, [391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968),] so long as the neutral regulation pro-

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21. *See Association of Community Organizations for Reform Now v. City of Frontenac*, 714 F.2d 8813, 818 (8th Cir. 1983); *see also New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232, 237-39 (2d Cir. 1982).

22. *See City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1554 (7th Cir.1986); *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248, 1254 (7th Cir.1985).

23. 472 U.S. 675, 105 S.Ct. 2897, 886 L.Ed.2d 536 (1985).

> motes a substantial government interest that would be achieved less effectively absent the regulation. *Cf.* [*Clark*], 104 S.Ct. at 3071 ("if the [national] parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment"). The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.[24]

Under this standard, in other words, an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest.[25]

In addition, narrow tailoring is less important when the potential for overbreadth burdens a category of speech subject to less than full first amendment protection; sexually-oriented expression falls into such a category.

We hold, then, that the City of Houston has selected a distance within a legislative range that is sufficiently tailored to the city's interest in the Ordinance to satisfy the first amendment. The City has chosen 750 feet as the proper distance and it is clear that the purposes of the Ordinance, in the words of *Albertini*, "would be achieved less effectively" but for regulation of this order. We will not second-guess the Council's decision that 750 feet is the most appropriate distance.

With regard to the second prong of the *City of Renton* test, plaintiffs claim that the Houston Ordinance does not

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24. *Id.*, 105 S.Ct. at 2907

25. Several circuit courts have noted *Albertini's* clarification of the tailoring requirement. *See in re G. & A. Books, Inc.*, 770 F.2d 288, 297-98 (2d Cir.1985); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1059 n. 3 (9th Cir.1986).

leave open ample alternative avenues of communication because it leaves only 40 sites available for their businesses, all of which are unavailable or unsuitable for commercial uses. We note first that the district court applied the correct test. As the *City of Renton* court put it, the appropriate inquiry was whether the Ordinance "refrain[s] from effectively denying the respondents a reasonable opportunity to open and operate an adult theater within the [C]ity."[26] In concrete terms, this means that alternative sites need not be commercially viable: "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation."[27]

The district court also did not err in finding that plaintiffs are not denied a "reasonable opportunity" to operate topless bars. Several experts testified as to potential alternative sites, estimating that "at least 100" and perhaps up to "tens of thousands" alternative sites exist. The 40 sites to which plaintiffs refer are those identified by one expert who studied approximately 20% of the City of Houston. Undoubtedly, other sites exist in the remaining 80% of the City.

Plaintiffs also argue that the Ordinance violates the first amendment because it represents an overly broad delegation of administrative authority in that the police

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26. *City of Renton*, 106 S.Ct. at 932; *see also Basiardanes*, 682 F.2d at 1214 (holding that a court must consider the effect of the alternative locations).

27. *City of Renton*, 106 S.Ct. at 932.

chief, as director, has absolute power. The Ordinance provides that the Chief of Police, as director, *shall* issue a permit unless one of eight[28] specific exceptions exist. The

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28. The ordinance originally listed nine exceptions; however, the district court struck down one requiring the applicant to comply with all federal and state laws on the ground that it did not provide adequate guidance and delegated too much discretion to the director of the ordinance. The remaining eight exceptions are as follows:

    (1) The applicant's enterprise is located within 750 feet of any school, church, or licensed day care center. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of such school, church, or licensed day care center;

    (2) The applicant's enterprise is located within 1000 feet of any other enterprise for which there is a permit. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of any other enterprise;

    (3) Seventy-five percent (75%) or more of the tracts within a circular area, as described herein, are residential in character. The radius of such circular area shall be 1000 feet, and the center of such circular area shall correspond to the midpoint of a line joining the two most distant points on the boundary of the tract on which the enterprise is located;

    (4) The applicant failed to supply all of the information requested on the application;

    (5) The applicant gave materially false, fraudulent or untruthful information on the application;

    (6) The applicant's enterprise is not in compliance with Section 28-129 and Section 28-130 of this Article;

    (7) The application or the enterprise does not meet any other requirements of this Article; or

    (8) The operator has had a permit revoked for the same enterprise within the one hundred eighty (180) day period next preceding the date that the application was filed.

plaintiffs argue that the district court erred in finding that the Ordinance provides adequate standards because it allows the director to revoke a permit when there are three or more violations of Ordinance regulations without requiring that there be convictions for those violations. Thus, plaintiffs contend, the fact that the chief of police may simply "conclude" that violations have occurred gives him absolute power.

In *Keyishian v. Board of Regents*,[29] the Supreme Court held that the test of whether a delegation scheme is permissible is whether the standards are "susceptible of objective measurement."[30] The Houston Ordinance is couched in mandatory language with eight explicit exceptions, and it provides for immediate review of any decision to deny a permit. The grant of discretion is based on definitive, intelligible standards and is not unbridled. We cannot say that the district court erred in finding that these standards are consistent with the first amendment.

Plaintiffs' final first amendment argument is that the Ordinance's signage requirements constitute an impermissible intrusion upon their protected interests. This argument is based on our pre-*Renton* holding in *Basiardanes*. In *Basiardanes*, this court struck down a provision of the Galveston ordinance that prohibited all advertising of adult theatres. This court found that the interest of shielding the public from lurid advertising was strong and legitimate, but held that the restriction of the Galveston ordinance totally banning all advertising was not narrowly

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29. 385 U.S. 5889, 887 S.Ct. 675, 17 L.Ed.2d 629 (1967).

30. *Id.* at 604, 87 S.Ct at 684.

tailored to that interest since it prohibited even "simple signs."[31]

The Houston Ordinance, however, does not ban advertising completely; it merely requires appellants to employ "simple signs." Governments have the right to regulate and limit the content of advertisements within reason,[32] and we are not persuaded that the City here has overstepped its bounds.

III

Plaintiffs claim that the Ordinance is unconstitutional because it violates their Fifth and Fourteenth Amendment rights. First, plaintiffs claim that the Ordinance constitutes a taking of property because its amortization provisions are inadequate. Second, they claim that the Ordinance violates plaintiffs' due process rights because it does not provide a neutral decisionmaker. Third, plaintiffs claim that the Ordinance is unconstitutionally vague because its definitions are susceptible to multiple interpretations. Finally, plaintiffs claim that the Ordinance is impermissibly overbroad in that it criminalizes conduct that is otherwise lawful.

We are unpersuaded by any of these arguments. First, the police power of a municipality is broad and includes restricting the uses of property.[33] Almost by definition,

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31. *Basiardanes*, 62 F.2d at 1219.

32. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303, 94 S. Ct. 2714, 2717, 41 L.Ed.2d 770 (1974); *Borrago v. City of Louisville*, 456 F.Supp. 30, 32 (W.D.Ky.1978).

33. *See Keystone Bituminous Coal Assoc. v. DeBenedictis*, — U.S. —, 107 S.Ct. 1232, 1245, 94 L.Ed.2d 472 (1987).

the Ordinance here does not prevent all reasonable uses of plaintiff's property; it follows that the Ordinance is not a taking.[34] Second, plaintiffs' due pjrocess rights are not violated because the chief of police is the director. There is no evidence that a chief of police is inherently not neutral, and in many situations, a chief of police may be in the best position to administer time, place and manner restrictions.[35] We cannot view the director's role in a vacuum. The Ordinance provides for appellate review by individuals other than the police chief, and thus we cannot say that due process is implicated. Third, plaintiffs' argument that the Ordinance's definitions are vague is not persuasive. A common sense reading of these definitions shows that they are adequately precise.[36]

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34. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, — U.S. —, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987).

35. For example, licenses to speak in a public place logically may be issued by the police department.

36. Plaintiffs challenge the definitions of "enterprise," "specified sexual activities," and "specified anatomical areas." The ordinance defines these terms as follows:

> *Enterprise*
>
> An adult cabaret, adult encounter parlor, adult lounge, adult modeling studio, or any establishment whose major business is the offering to customers of a product or service which is intended to provide sexual stimulation or sexual gratification to such customers, and which is distinguished by or characterize dby an empasis on matter depicting. describing or relating to specified sexual activities or specified anatomical areas. The term "enterprise" shall not be construed to include (1) any "adult bookstore," or "adult movie theatre," as those terms are defined herein, (2) any business operated by or employing licensed psychologist, licensed physical

(Continued on following page)

Finally, the Ordinance is not overbroad in that it criminalizes conduct that is otherwise lawful. The plaintiffs argue that the effect of the Ordinance is to treat the same conduct—exposure of certain bodily parts—differently depending on the location of the conduct. Although Texas courts have held that different punishments for the same criminal acts depending on where the act occurred violates the fifth amendment,[37] no court has held that it is unconstitutional to criminalize conduct performed in certain locations while the same conduct is not criminal when

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(Continued from previous page)

therapists, licensed athletic trainers, licensed cosmotologists, or licensed barbers performing functions authorized under the licenses held, (3) any business operated by or employing licened physicians or licensed healing arts, or (4) any retail establishment whose major business is the offering of wearing apparel for sale to customers.

Specified Sexual Activities

(1) Human genitals in a discernible state of sexual stimulation or arousal, or

(2) Acts of human masturbation, sexual intercourse or sodomy, or

(3) Any combination of the foregoing.

Specified Anatomical Areas

(1) Less than completely and opaquely covered:

(i) Human genitals, public region or pubic hair, or

(ii) Buttock, or

(iii) Female breast or breasts below a point immediately above the top of the areola, or

(iv) Any combination of the foregoing; or,

(2) Human male genitals in a discernibly erect state, even if completely and opaquely covered.

37. *See Memet v. State*, 642 S.W.2d 518 (Tex.App.—Houston [14th Dist.] 1982, no writ).

performed in others. It is not criminal to consume alcohol on one's back porch; it is criminal to do so while driving an automobile.

IV

Plaintiffs claim that the Houston Ordinance violates the equal protection rights of topless bars because it regulates only one form of sexually oriented business and not others, because it is not gender neutral, and because the Ordinance's signage provisions single out topless bars for different treatment. Again, we are unpersuaded.

First, the Ordinance does not deny plaintiffs equal protection because it regulates topless bars but does not regulate adult bookstores and theatres. This argument fails to recognize the fact that adult theatres and bookstores still are specifically exempted from the state enabling act, and thus the City has no authority to regulate these businesses.[38] The argument also ignores that the Ordinance here was enacted as a companion to an earlier ordinance that specifically excluded topless bars due to preemption by state law. Furthermore, the Supreme Court dismissed a similar "under-inclusive" argument in *Renton,* stating, "That Renton chose first to address the potential problems caused by one particular kind of adult business in no way suggests that the city has 'singled out' adult theaters for discriminatory treatment."[39]

Second, plaintiffs argue that the Ordinance is unconstitutional because it is not gender neutral in that it pro-

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38. *See* Tex.Rev.Civ.Stat.Ann. art. 2372w (Vernon Supp. 1987).

39. *Renton,* 106 S.Ct. at 931.

hibits exposure of female breasts but not male breasts, and that to do so, the City must prove a "vital state interest in allowing males to expose their breasts." This is not the correct test. Of course, this Ordinance is facially discriminatory, but to uphold its constitutionality, we need conclude only that regulation of *female* breasts is substantially related to an important governmental interest, not that the exposure of *male* breasts is sorelated. At best, the test is not strict scrutiny, but an intermediate level of review.[40] The district court did not err in holding that such regulation of female breasts is substantially related to the City's interest in regulation.

Finally, plaintiffs claim that the Ordinance violates their equal protection rights because the signage restrictions imposed under the Ordinance far exceed the reasonable restrictions placed on other businesses and thus single out topless bars for different treatment. Because topless bars are not a "protected class," the City need only demonstrate that the signage restrictions are reasonably related to a legitimate government interest.[41] The district court did not err in holding that the City had demonstrated that the signage restrictions were rationally related to the legitimate interest in preventing detrimental effects on minors.

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40. *See Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985) ("A gender classification fails unless it is substantially related to a sufficiently important government interest.").

41. *Cf. Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976).

V

Plaintiffs contend that the Ordinance cannot be enforced because it conflicts with the Texas Alcoholic Beverage Code,[42] a preemptive state statute regulating businesses at which alcoholic beverages are sold and because it exceeds the authority of the state enabling act, article 2372w. We are not persuaded by either of these arguments.

First, plaintiffs contend that because article 2372w provides that "the existing preemption by the state of regulation of alcoholic beverages" is not affected by the article, that any ordinance adopted under the authority of article 2372w must contain identical provisions to the Texas Alcoholic Beverage Code and that the Houston Ordinance impermissibly deviates from the 300 foot distancing restrictions of the Alcoholic Beverage Code. However, the preemption clause of that Code speaks only to the governance of the "manufacture, sale, distribution, transportation, and possession of alcoholic beverages."[43] The Houston Ordinance regulates sexually oriented businesses, not alcoholic beverages. While Texas courts have struck down ordinances that specifically regulate the sale of alcoholic beverages as conflicting with the alcohol code,[44] those courts also have recognized that where the sale of alcoholic beverages is not directly regulated, zoning schemes can be

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42. Tex.Alco.Bev.Code Ann. § 1.01 *et seq.* (Vernon 1978).

43. Tex.Rev.Civ.Stat.Ann. art. 2372w (Vernon Supp.1987).

44. *See, e.g. City of Wichita Falls v. Abell,* 566 S.W.2d 336 (Tex. Civ.App.—Ft. Worth writ ref'd n.r.e.) (striking down an ordinance requiring off-premises liquor licenses).

enacted in addition to the scheme set out in the alcohol code.[45]

Second, we are not persuaded that the Ordinance exceeds the authority of the state enabling act. Plaintiffs argue that article 2372w allows a city either to restrict the locations of businesses or to incorporate distancing restrictions but not both. They argue that the use of the word "or" indicates that the legislature intended to provide mutually exclusive options. However, the Texas Court of Appeals has held explicitly that the statute provides authority to restrict the location of the enterprises *and* to enact distancing restrictions.[46] We must give deference to the Texas courts' interpretation of a Texas statute.

AFFIRMED.

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45. *See Young, Wilkinson & Roberts v. City Abilene*, 704 S.W. 2d 380, 382 (Tex.App.—Eastland 1985, writ ref'd n.r.e.); *Banknote Club and Stan's Boilermaker v. City of Dallas*, 608 S.W.2d 716, 718 (Tex.Civ.App.—Dallas 1980, writ ref'd. n.r.e.).

46. *See Memet v. State*, 642 S.W.2d at 522 ("Thus, the enabling legislation authorizes not only restriction of location, but also density, and, additionally, allows prohibition entirely in some areas."). Although article 2372w has been amended since *Memet*, the particular language in question was not altered.

APPENDIX B

SDJ, INC., d/b/a Sugar Babes, et al.,
Plaintiffs-Appellants,

v.

The CITY OF HOUSTON, et al.,
Defendants-Appellees.

No. 86-2735.

United States Court of Appeals,
Fifth Circuit.
March 15, 1988.

Owners of topless dancing bars brought action challenging constitutionality of city ordinance regulating sexually oriented businesses. The United States District Court for the Southern District of Texas, 636 F.Supp. 1359, Gabrielle K. McDonald, J., upheld relevant provisions, and owners appealed. The Court of Appeals, 837 F.2d 1268, affirmed. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals, held that it was not required to apply "least restrictive means analysis" to city ordinance, even though Supreme Court had summarily affirmed decision of another circuit using requirement.

Petition for rehearing denied; suggestion for rehearing en banc denied.

Karrie Key, Joel M. Androphy, David H. Berg, Berg & Androphy, Houston, Tex., for SDJ., Inc., et al.

Jack R. Burns, Bellevue, Wash. for M.E.F. Enterprises Inc. and MKD Enterprises.

Robert J. Collins, Sp. Asst. City Atty., and Gilbert D. Douglas, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 02/10/88, 5th Cir.1988, 837 F.2d 1268)

Before REAVLEY, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM.

In their petition for rehearing Appellants argue that this court must apply a "least restrictive means" analysis to the Houston Ordinance, in accord with the decision in *City of Watseka v. Illinois Public Action Council*,[1] In that case, the Seventh Circuit used a two-prong analysis to test the tailoring of a time, place or manner restriction on political solicitation. The court required the City to show first, that there was a significant relationship between its regulatory interest and the means selected and, second, that the City chose the "least restrictive means"

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1. 796 F.2d 1547 (7th Cir.1986).

to implement that interest.[2] The Seventh Circuit found neither requirement satisfied.[3] Appellants urge that the *City of Watseka* decision is now binding precedent in this circuit because the Supreme Court summarily affirmed the Seventh Circuit's judgment.[4]

Although it is true that a summary affirmance by the Supreme Court is entitled to precedential weight,[5] such a decision does not necessarily represent the Court's endorsement of the lower court's reasoning. As the Court has stated:

> We have often recognized that the precedential effect of a summary affirmance extends no further than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment. *Illinois Election Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); see *Fusari v. Steinberg*, 419 U.S. 379, 391-392, 95 S.Ct. 533, 540-541, 42 L.Ed.2d 521 (1975) (Burger, C.J., concurring).[6]

The Supreme Court also has cautioned lower courts not to give a summary affirmance an interpretation that would repudiate doctrines previously announced by the Court

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2. *Id.* at 1554.

3. *Id.* at 1555-57.

4. *See City of Watseka v. Illinois Public Action Council*, — U.S. —, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987).

5. *See Tully v. Griffin, Inc.*, 429 U.S. 68, 74, 97 S.Ct. 219, 223, 50 L.Ed.2d 227 (1976).

6. *Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 5, 103 S.Ct. 1564, 1568 n. 5, 75 L.Ed.2d 547 (1983).

in fully argued cases; in short, summary actions "should not be understood as breaking new ground."[7]

With these principles in mind, we look first at the jurisdictional statement filed with the Supreme Court in *City of Watseka* to determine whether the "least restrictive means" issue was squarely presented.[8] The closest question listed in the jurisdictional statement is: "In the test of reasonableness of Watseka's ordinance, must it be the most reasonable limitation or only a reasonable limitation?"[9] This statement of the issue is opaque, but the "test of reasonableness" could be read to mean the standard for narrow tailoring, in which case the restrictiveness of means would fairly have been an issue before the Court.

However, even if the Supreme Court was properly presented with the issue, we still cannot conclude that the Court's summary affirmance requires us to apply the Seventh Circuit's least-restrictive means analysis. Given the Supreme Court's unwillingness to apply such scrutiny in the *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.E.2d 29 (1986) and *United States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536

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7. *Mandel*, 432 U.S. at 176, 97 S.Ct. at 2240 ("An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.") (quoting *Fusari*, 419 U.S. at 391-92, 95 S.Ct. at 540-41 (Burger, C.J., concurring)).

8. *See Mandel*, 432 U.S. at 180, 97 S.Ct. at 2242 (Brennan, J., concurring).

9. Appellant's Jurisdictional Statement, *City of Watseka v. Illinois Public Action Council*, No. 86-631 (U.S. Oct. 16, 1986).

(1985) cases,[10] the Court would have been "breaking new ground" to adopt a least-restrictive means test in the *City of Watseka* affirmance. Moreover, such an approach was not essential to the affirmance; the Court need only have agreed with the Seventh Circuit's alternative conclusion that the City failed to demonstrate a significant relationship between the regulation and the City's interests. In this case, by contrast, we found that the City of Houston demonstrated such a relationship.[11]

It is true that three Justices dissented from the summary affirmance in *City of Watseka,* persuaded that the Seventh Circuit had erred in adding a least-restrictive means component to time, place, or manner analysis. *See City of Watseka,* 107 S.Ct. at 920 (White, J., Rehnquist, C.J., and O'Connor, J., dissenting). To some extent, this confirms our conclusion that the Seventh Circuit's approach broke with precedent. The fact that the Justices dissented from affirmance for that reason, however, does not indicate that the majority adopted the Seventh Circuit's reasoning. We could make that inference only if the least restrictive means approach had been essential to the affirmance and consistent with the Court's prior decisions in argued cases.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

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10. *See supra* 837 F.2d at 1275-76.

11. *See supra* at 1276.

APPENDIX C

SDJ, INC., d/b/a Sugar Babes, et al., Plaintiffs,

v.

THE CITY OF HOUSTON, et al., Defendants.

Civ. A. No. H-86-1291.

United States District Court,
S.D. Texas,
Houston Division,
June 3, 1986.

Owners of topless dancing bars brought action challenging constitutionality of city ordinance regulating sexually oriented businesses. The District Court, McDonald, J., held that: (1) ordinance was valid exercise of city's police powers; (2) land use restrictions in ordinance were content-neutral and designed to serve city's interest in regulating sexually oriented businesses; (3) ordinance was not unconstitutionally vague with regard to its definitions and its application; (4) certain disclosure requirements were not sufficiently narrowly drawn to meet purpose of ordinance without undue restrictions on First Amendment interests; and (5) finding that certain provisions of ordinance were unconstitutional did not invalidate entire ordinance.

Ordered accordingly.

David H. Berg, Joel M. Androphy, Houston, Tex., for plaintiffs.

JERRY E. SMITH, Robert J. Collins, Paul R. Bibler, Jr., Gilbert Douglas, Houston, Tex., for defendants.

MEMORANDUM OPINION
AND ORDER

McDONALD, District Judge.

This is an action filed by twenty three owners of topless bars challenging the constitutionality of the City of Houston's Ordinance regulating sexually oriented businesses. In 1983, the City of Houston enacted an Ordinance provididng, *inter alia,* for the regulation of the location of certain sexually oriented businesses and the exterior portion and signage of such businesses. The Plaintiffs were specifically exempted from the 1983 Ordinance. In 1985, the State of Texas Legislature amended the enabling statute to allow cities, including the City of Houston, to regulate these sexually oriented businesses previously exempted. The City of Houston then enacted Ordinance 86-323 to regulate the thoses exually oriented businesses. In this action the Plaintiffs challenge the validity of Ordinance 86-323. The challenge is two-pronged: first, a facial constitutional attack and second, a challenge that the Ordinance impermissibly exceeds the grant of authority from the enabling statute.

Plaintiffs filed an Original Complaint, Application for a Temporary Restraining Order and Applications for Preliminary and Permanent Injunctions on March 31, 1986, to enjoin the Defendants from instituting and carrying out City Ordinance, No. 86-323. After a Temporary

Restraining Order hearing on April 3, 1986, the Court enjoined the Defendants from enforcing Section 28-123 (a)(6) of the Ordinance, denied the Temporary Restraining Order with regard to the other application requirements, and reserved its ruling on the constitutionality of the Ordinance. The Court combined Plaintiffs' Application for a Preliminary Injunction with their Application for a Permanent Injunction and proceeded with a trial on the merits.

After receipt of numerous exhibits, the testimony of witnesses and the argument of counsel the Court concludes that Ordinance No. 86-323 is invalid with respect to Sections 28-123(a)(1)(i) + (a)(6) and 28-125(b)(8). The Court permanently enjoins the Defendants from enforcing Sections 28-123(a)(1)(i) + (a)(6) and 28-125(b)(8) of Ordinance No. 86-323. However, the invalidation of the above Sections does not impede the application of the remaining portions of the Ordinance, because the Ordinance contains a severability clause and those Sections are not crucial to the operation of the Ordinance. Ordinance, § 3, p. 28.

Plaintiffs, SDJ, INC., d/b/a SUGAR BABES; W.F.K. INC. d/b/a SUGAR'S; W.F.K. INC. SIX d/b/a SUGAR'S DEJA-VU; T.D.D., GRINGO'S SALOON, INC. d/b/a FANTASIA; 747, INC. d/b/a TEXAS COWGIRLS; TWO GREEKS, INC. d/b/a CANDLELITE LOUNGE; M.B. TEX, ENTERPRISES, INC. d/b/a IMAGINATIONS; SPIROS KARMAELEGOS d/b/a TEXAS FILLIES; HI-10, INC. d/b/a HI-10 CABARET; TRUMPS, INC. d/b/a RICK'S CABARET; SOUTHWEST CLUB CO., INC. d/b/a PLAYMATES; SSD INC. d/b/a RITZ CABARET; ARIS MYLONAS d/b/a BOGEY'S; JIMMY TSAROUHAS d/b/a CRICKETS;

M.E.F. ENTERPRISES, INC., d/b/a CHICS; MKD ENTERPRISES, INC., d/b/a CHICS; J & J INC. d/b/a MOULIN ROUGE; NAFPAKTOS, INC. d/b/a PINK PUSSYCAT; VAT, INC. d/b/a YELLOW ROSE OF TEXAS; ALEXANDRIA VIVI BARSAKIS d/b/a WHIP CLUB; Da JOHN, INC. d/b/a DREAM STREET (hereinafter referred to collectively as "Plaintiffs"), are nightclubs offering topless dancing entertainment and presently operating in Houston, Texas.

Defendant, THE CITY OF HOUSTON, is a municipal corporation situated in Harris County, Texas. Defendant, LEE BROWN, is the Chief of Police of the Houston Police Department in Houston, Harris County, Texas. As Chief of Police, Chief Brown is the Director of the Ordinance and is in charge of enforcement of the provisions of the Ordinance, including the issuance, denial and revocation of permits. He is being sued in his official capacity. Defendant, JERRY SMITH, is the City Attorney for the City of Houston, Harris County, Texas. As City Attorney, Jerry Smith is responsible for the prosecution of charges filed in municipal court in Houston, Texas, for violation of the Ordinance and the filing of any injunction pursuant thereto. Jerry Smith is sued in his official capacity as City Attorney.[1]

A Committee on Sexually Oriented Businesses was established in 1982 by the City Council of the City of Houston. Councilman George Grenias was the Chairman of that Committee. The Committee drafted a report in

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1. The Plaintiffs originally sued the individual Defendants in their official and individual capacities. The Court granted the Plaintiffs' unopposed oral motion to amend their Complaint to delete their claim against these Defendants in their individual capacities.

1983 regarding the need to regulate sexually oriented businesses. *See* Defendants' Exhibit No. 1, Attachment. Councilman Grenias testified that the Committee was formed because of community concern about the location of sexually oriented businesses. Following its creation, the Committee held public hearings, received public and expert testimony on the effects of sexually oriented businesses on surrounding land uses, and held committee session meetings. In 1986, after Article 2372w was amended to include sexually oriented buusinesses licensed under the Alcoholic Beverage Code, the Committee drafted an amended report. *See* Defendants' Exhibit No. 6. The City Council relied on the 1983 report and the 1986 amended report on the regulation of sexually oriented businesses in adopting the findings to Ordinance No. 86-323. *See* Defendants' Exhibit No. 5.

Before 1985, the Plaintiffs were specifically exempted from Article 2372w, the enabling legislature allowing home-rule cities to pass ordinances regulating "sexually oriented businesses." The 1985 Amendment to 2372w specifically included sexually oriented businesses licensed and permitted to operate under the Alcoholic Beverage Code. Each of the Plaintiffs is licensed and/or permitted to operate pursuant to the Alcoholic Beverage Code. Moreover, they all provide entertainment by "topless" dancers.

On or about March 5, 1986, the City Council of the City of Houston passed Ordinance No. 86-323 ("the Ordinance") which is the basis of this dispute. (*See* Appendix I). The Ordinance was passed to regulate sexually oriented businesses by requiring that their owners or operators obtain permits from the City of Houston in order to commence or to continue their operations. The Ordinance

provides, as to location, that no enterprises hall operate within 750 feet of a school, church, or licensed day care center. It further provides that an enterprise shall not locate within 1000 feet of another permitted enterprise or within a residential tract that is 75% residential in character. The Ordinance also places restrictions on the signage and exteriors of the enterprises. The Ordinance provides that it shall take affect on June 3, 1986. (Ord., p. 25). The Ordinance also requires that any operator of an existing enterprise who desires to continue its operation on or after June 3, 1986, shall file a permit application with the Director, Chief Brown, or his designee on or before April 4, 1986. Ordinance No. § 4(b). (Ord., 31). The Ordinance further provides that any enterprises, as defined therein, existing as of March 5, 1986, may continue to do business until November 30, 1986, if their permit applications are denied, provided such enterprises timely filed their application prior to April 4, 1986. The Ordinance provides that it shall be unlawful for any person to operate an enterprise without a permit and violations of the Ordinance not covered by state statute constitute a misdemeanor. § 28-133 (Ord., p. 28). Moreover, the City Attorney is authorized to file suit to enjoin violations of the Ordinance. § 28-124 (Ord., p. 28). The Ordinance does not expressly name "topless dancing" clubs as a type of sexually oriented business.

From the owners of the Plaintiffs who testified, the Court finds that topless bars operate from approximately eleven o'clock in the morning until two o'clock the next morning. Most of the clubs serve lunch and dinner. The majority of the profits made by the clubs come from the sale of alcohol. The primary attraction of the clubs is the

offering of topless dancing. Topless clubs hire a number of employees: bartenders, disco jockeys, floor masters, doormen, security personnel, cooks, managers, and waitresses. They also hire dancers, who receive a commission based on the percentage of drinks sold and receive tips from customers ranging from five dollars to ten dollars per customer.

Section 5(b) of the Ordinance provides for a six-month grace period in which existing non-conforming businesses may discontinue their operations. Under Section 5(c), the Director "may in his discretion, grant an extension for operation after November 30, 1986, if the owner of the existing enterprise proves that he is unable to "recoup his investment" in such existing enterprise by that date." Ordinance § 5(c). The provision requires the applicant to file a written request for such extension on or before September 1, 1986. Ordinance § 5(c). The request shall set forth the amount of the owner's investment in the existing enterprise through March 5, 1986; the amount of the investment that has been or will be realized through November 30, 1986; the life expectancy of the existing enterprise; and the existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of the lease. Ordinance § 5(c).

The four factors set out in Section 5(c) include methods of evaluating the value of existing businesses. Real estate appraiser Edward B. Graham testified that there are three approaches to valuation of a business: the cost approach, the income approach and the market approach. Under any of these approaches, the appraiser attempts to take into account the location of the business, and the value of the building structure itself.

With regard to the land distance restrictions of the Ordinance, Efraim S. Garcia, Director of the Department of Planning and Development in the City of Houston, testified before City Council on the affect of sexually oriented businesses on surrounding areas. His testimony along with the 1983 and 1986 reports supports the conclusion that the location of sexually oriented businesses have an adverse impact on schools, churches and licensed day care centers and on surrounding residential property values. *See* Defendants' Exhibit No. 1, Report-Committee on the Proposed Regulation of Sexually Oriented Businesses, 1983, pp. 7-9 ("1983 Report"); Defendants' Exhibit No. 6, Amended Report-Committee on the Proposed Regulation of Sexually Oriented Businesses, 1986, pp. 6-11 ("1986 Report"). Moreover, the evidence demonstrates that the location of sexually oriented businesses and the exterior appearance, including signage, of those businesses have an adverse impact on minors. *See* Defendants' Exhibit No. 1, 1983 Report, pp. 7, 8.

The Defendants presented testimony, by way of charts, showing that alternative location sites were available for the Plaintiffs. *See* Defendants' Exhibit No. 6, 1986 Report, p. 10; Defendants' Exhibit Nos. 14-33. Out of the twenty-three Plaintiffs listed on the Complaint, seven of the clubs have been approved under the application procedure of the Ordinance. *See* Defendants' Exhibit No. 8. Most of the remaining sixteen clubs have double violations: nine violate the distance requirement to schools, churches, and licensed day care centers; three violate the distance requirement to another sexually oriented business; eight violate the residential requirement; ten have sign violations; six have color requirement violations; and

one club failed to file an application. *See* Defendants' Exhibit No. 8.

Plaintiffs contend that the Ordinance violates 42 U.S.C. § 1983 and the First, Fifth, and Fourteenth Amendments to the United States Constitution in addition to violations of Article III, § 35 of the Texas State Constitution. This Court accordingly has jurisdiction pursuant to 28 U.S.C. § 1331, federal question jurisdiction, and 28 U.S.C. § 1343 pertaining to actions for deprivation of civil rights. The Court has pendent jurisdiction of the state law claims asserted herein because such claims derive from a common nucleus of facts with the federal claims and the Plaintiffs would ordinarily be expected to try them all in one proceeding. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Venue of this action is proper under 28 U.S.C. § 1391 because all Defendants reside in, and all claims alleged herein arose in, the Southern District of Texas, Houston Division. 28 U.S.C. § 1391 (1984). The Plaintiffs' Application for a preliminary injunction is consolidated with the permanent injunction trial on the merits. Fed.R.Civ.P. 65(a)(2).

Plaintiffs challenge the validity of Ordinance No. 86-323 on various federal and state law grounds. Defendants do not explicitly challenge the Plaintiffs' standing to bring this lawsuit.[2] The Plaintiffs meet all of the prerequisites

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2. Defendants do challenge the Plaintiffs standing to raise issues of non-parties to this lawsuit; such as the Alley Theatre and the possible effects this Ordinance may have on its more revealing theatre productions. However, as the Supreme Court stated in *Schad, et al., v. Borough of Mount Ephram,* opponents who challenge an ordinance on the basis of the

(Continued on following page)

for constitutional standing in this case. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (The requirements are (1) that some actual or threatened injury is suffered; (2) that the existing injury can be traced to the Defendants' challenged action, which is putatively illegal; and (3) that the injury will likely be redressed by a favorable decision.)

The Plaintiffs have launched a number of facial attacks on the ordinance. Initially, Plaintiffs claim that the ordinance was enacted to ban all topless dancing, which is protected by the first amendment. Generally, local land-use restrictions imposed under a quasi-legislative process are governed only by limitations on the legislative process. *Horizon Concepts, Inc. v. City of Balch Springs, et al.,* 789 F.2d 1165 (5th Cir. 1986) (The standard for review of land-use ordinances is whether they are arbitrary and capricious.) However, the seemingly broad power of local government to control land use is not unchallengeable; it must be exercised within constitutional limits. *Schad, et al., v. Borough of Mount Ephram,* 452 U.S. 61, 68, 101 S.Ct. 2176, 2182, 68 L.Ed.2d 671 (1981). The standard of review is determined by the nature of the right assertedly threatened or violated. *Id.* In the case before this Court, Plaintiffs claim that the land-use ordinance bans their first amendment right to freedom of expression. Specific-

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(Continued from previous page)

first amendment are "entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." *Schad, et al., v. Borough of Mount Ephram,* 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981). For the same reason, the Plaintiffs in this lawsuit are entitled to raise similar issues.

ally, Plaintiffs claim that they have a protected liberty interest in employing topless dancers in their clubs. Topless dancing, like nude dancing, is not without its first amendment protections from governmental regulation. *Schad,* 452 U.S. at 66, 101 S.Ct. at 2181. When a land-use ordinance infringes upon a protected liberty, it must be narrowly drawn and it must further a substantial governmental interest to satisfy constitutional protections. *Schad,* 452 U.S. at 68, 101 S.Ct. at 2182.

Ordinances enacted for the purpose of restricting speech on the basis of content presumptively violate the first amendment. *City of Renton, et al., v. Playtime Theatres, Inc., et al.* — U.S. —, 106 S.Ct. 925, 928, 89 L. Ed.2d 29, *reh'g denied,* — U.S. —, 106 S.Ct. 1663, 90 L.Ed. 2d 205 (1986). However, time, place and manner regulations, which are "content-neutral," are acceptable where they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *Renton,* 106 S.Ct. at 928. Initially, the Court must determine whether the ordinance is "content-based" or "content-neutral." An ordinance is considered content-neutral where the predominant concerns of the legislature are with the adverse secondary effects of activities and not the content of the activities. *Renton,* 106 S.Ct. at 929. In this case the preamble of the ordinance shows that the legislature was concerned with the adverse secondary effects of sexually oriented businesses on property values, churches, schools, and day care centers; the criminal activity in areas surrounding those businesses; and the mental health of minors who come into contact with adult material on night club signs. Houston, Texas Ordinance No. 86-323 (March, 1963) (*See* Defen-

dants' Exhibit No. 5.) Ordinance No. 86-323 regulates the location of sexually oriented businesses. It does not ban then from operation. This Court concludes that the Houston Ordinance is not aimed at banning of restricting topless dancing, but rather it concerns relocation of sexually oriented businesses, including topless dancing clubs, to curb their secondary effect on the surrounding community.

Plaintiffs launch their primary attack against the ordinance on grounds that the City has not proven a substantial governmental interest in relocating topless bars. The burden is on the City to show that a substantial governmental interest exists in regulating topless dancing bars and that the ordinance is narrowly drawn to serve that interest. *City of Renton, et al., v. Playtime Theatres, Inc., et al.*, — U.S. —, 106 S.Ct. 925, 928 *reh'g denied*, — U.S. —, 106 S.Ct. 1663, 90 L.Ed.2d 205 (1986). A governmental regulation is sufficiently justified if it is within the constitutional power the government and furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968).

A city's interest in attempting to preserve the quality of urban life is one that must be accorded the highest respect. *Renton*, 106 S.Ct. at 930; *Young, et al., v. American Mini Theatres, Inc., et al.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 *reh'g denied*, 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976). The first amendment does not require a city before enacting such an ordinance to conduct new studies or produce evidence independent of

that already generated by other cities, so long as the evidence relied upon is reasonably believed to be relevant to the problem that the City addresses. *Renton,* 106 S.Ct. at 931. The Court concludes that the hearings and studies conducted by the City Council of Houston are sufficient to establish that sexually oriented businesses have an adverse impact on residential property, churches, schools, and day care centers. The evidence collected by the City Council, in its Report of 1983 on sexually oriented businesses, and confirmed in its Report of 1986, is sufficiently comprehensive for the City to establish that topless dancing clubs have the same effect on land-use and secondary criminal activities as other sexually oriented businesses.

Plaintiffs challenge the basis for the conclusions given to this Court by the expert witnesses, who also testified before the City Council. They contend that there is no basis in fact for the City's findings that topless bars affect surrounding property values, affect residential neighborhoods, or affect minors. However, the evidence establishes that the expert witnesses relied on their experiences and understanding of the Houston market in determining the effect of sexually oriented businesses on surrounding property values. The fact that other experts hold conflicting opinions on the effects of sexually oriented businesses on property values is irrelevant to the Court's first amendment inquiry. It is the legislature, and not the courts, which determines how much testimony is enough to require city action in redressing a perceived problem. The Courts role is to determine whether the evidence the City relies upon is reasonably believed to be relevant to the

problem being addressed by the City. *Renton*, 106 S.Ct. at 931. This may include the experiences of other cities with respect to sexually oriented businesses. *Id.* The Court finds that the City has met its burden of demonstrating a problem requiring the exercise of its police supervisory powers to provide for the welfare of the citizens.

Plaintiffs also argue that the legislature enacted Ordinance 86-323 to get rid of topless bars. However, an alleged improper legislative motive does not support invalidation of an ordinance on constitutional grounds. *O'Brien*, 391 U.S. at 383, 88 S.Ct. at 1682. The Court concludes that the City of Houston has demonstrated a substantial governmental interest in instituting land-use restrictions on sexually oriented businesses.

Plaintiffs challenge the Ordinance on grounds that it is unconstitutionally vague. An ordinance is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is proscribed by the Ordinance. *Stansberry v. Holmes*, 613 F.2d 1285, 1288, *reh'g denied*, 616 F.2d 568, *cert. denied*, 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 112 (5th Cir.1980). An ordinance may also be declared vague if the application of it causes arbitrary and erratic arrests or convictions. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

The Plaintiffs argue they will be driven out of business because they are unsure whether the statute applies to their establishments. The real issue is whether the term "sexually oriented business" gives fair notice to owners and operators of topless dancing clubs that they are subject to the proscriptions of the Ordinance. The

Ordinance requires every owner or operator of an "enterprise" to obtain a permit before doing business in the City of Houston. Houston, Tex. Ordinance No. 86-323, § 28-122 (March 5, 1986). The Ordinance defines enterprise as an "adult cabaret, adult encounter parlor, adult lounge, adult modeling studio or any establishment whose major business is the offering to customers a product or service which is intended to provide sexual stimulation or sexual gratification to such customers. . . ." Ordinance, pp. 8, 9. The Ordinance by way of its caption, applies to all sexually oriented enterprises. In *Stansberry v. Holmes,* the Court of Appeals for the Fifth Circuit held that the term "sexually oriented commercial enterprise" was not vague or overly broad because the definition was limited to businesses "whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification." *Stansberry,* 613 F.2d at 1290; *see accord, Memet v. State,* 642 S.W.2d 518, 522-23 (Tex.Civ. App. 14th Dist.1982) (where the state court struck down a vagueness challenge to the definition of "sexually oriented enterprises.") Similarly, the term "enterprise" is limited to a business whose major activity is the offering to customers of a service which is intended to provide "sexual stimulation or sexual gratification" to customers. Based upon the evidence adduced at trial, it is undisputed, and the Court concludes that the major "drawing card" for the Plaintiffs' businesses is the topless dancers. More than one of the cabaret owner's who testified described the activities performed by topless dancers at their clubs. That testimony convinces the Court that those activities are sexually oriented.

The definition of enterprise is further qualified because the service must be distinguished by emphasis on

matters depicting "specified sexual activities" or "specified anatomical areas."[3] Ordinance, p. 9. By inserting the phrase "whose major business," and the further emphasis on matters depicting "specified anatomical areas," the City Council has excluded all businesses whose activities might incidently cause sexual stimulation such as the Alley Theatre. *See Stansberry,* 613 F.2d at 1290. The clear focus of the Ordinance is directed toward a business that routinely provides sexually-oriented entertainment. For the above reasons, fair notice is given to the establishments that they are subject to regulation under the Ordinance.

Plaintiffs contend that the Ordinance delegates overly broad discretion to the Director to grant or deny an application for a permit. An ordinance may be overly broad if it allows standardless discretion in the Director to grant or deny a permit. *Grayned v. City of Rockford,* 408 U.S. 104, 113, 92 S.Ct. 2294, 2301, 33 L.Ed.2d 222 (1972). The Ordinance provides that the "Director shall issue a permit to the applicant unless one or more of the following conditions exist. . . ." Ordinance, § 28-125(b). The first of the conditions in the applicants location with respect to a school, church or licensed day care center. The Ordinance requires applicants to be 750 feet away. Ordinance, § 28-125(b)(1). The distance is measured in a straight line from the nearest point on the property line of the appli-

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3. Both terms—specified anatomical areas and specified sexual activities—are defined in the Ordinance. Ordinance p. 12. The Plaintiffs' businesses undoubtedly offer a service (topless dancing) which falls within the definition of specified anatomical areas because they display the female breast save a tiny opaque pasty or two. Ordinance, p. 12, Section (1) (iii).

cant's enterprise to the nearest point on the property line of the school, church or licensed day care center. Ordinance, § 28-125(b)(1). The Court finds that the language of Section 28-125(b)(1) confers no discretion to the Director to determine violation of that section. The same analysis applies to Section 28-125(b)(2), which requires that the applicant's enterprise be located over 1000 feet from any other enterprise for which there is a permit. Ordinance, § 28-125(b)(2).

Plaintiffs argue that Subsection (b)(3), which disallows a permit if seventy-five percent or more of the tracts within a circular area with a radius of 1000 feet are residential, vests unreasonable discretion in the hands of the Director. Ordinance 28-125(b)(3). Plaintiffs base their contentions on the definition of "tract." Tract is defined in the Ordinance as a "contiguous parcel of land under common ownership, whether situated within the City or not." Ordinance, § 28-121, p. 12. After listening to testimony, observing diagrams of the circular area, and having the benefit of oral argument, the Court concludes that the requirement of subsection (b)(3) does not delegate unbridled discretion to the Director to grant or deny a permit.

In addition to the above, Plaintiffs assert that Subsections (b)(6) and (b)(8) are without adequate standards to guide the Director's actions. Subsection (b)(6) requires the applicant to comply with Section 28-129 (exterior portions of the establishment) and Section 28-130 (signage of the establishment). Ordinance, § 28-125(b)(6), 129, 130. Section 28-129 requires that the exterior portions of establishment be free from flashing lights, words,

lettering, photographs, silhouettes, drawings, or pictorial representations and, with few exceptions, the exterior portions of the establishment must be painted a single achromatic color. Ordinance, § 28-129(a)-(d). Section 28-130 requires that the establishment only display one "primary sign" and one "secondary sign." Ordinance, § 28-130(a)-(f). The language of neither Section is vague for the same reasons as Section 28-125(b)(3). The Court concludes that the language adequately guides the Director in carrying out his duty to approve or disapprove a permit based on the applicant's exterior decoration or signage. The Plaintiffs' main attack regards the City's asserted need for the above regulations. That issue will be addressed in a latter portion of this opinion. Plaintiffs have argued generally that the statute is overly broad because it is not narrowly drawn to serve a legitimate governmental interest with only minimal intrusion upon first amendment interests. *Schad,* 452 U.S. at 75, 101 S.Ct. at 2186; *Kusiardanes v. City of Galveston,* 682 F.2d 1203, 1216 (5th Cir.1982). Plaintiffs challenge the signage provision, exterior provision, and the distance provisions on grounds that they are beyond the scope of minimal intrusion upon first amendment interests.

With regard to the exterior condition requirements and the signage requirement, the Court concludes that the government has met that burden. The regulations affecting the exterior portion and signage of sexually oriented businesses are valid if they are directed at the signs themselves rather than at the protected activities. *See Borrago v. City of Louisville,* 456 F.Supp. 30, 32 (W.D.Ky.1978). A restriction on the signage and exterior portions which allows modest, subdued advertising is appropriate in order

to prevent a decline in the values of surrounding properties, and thus prevent deterioration of neighborhoods. *See Basiardanes,* 682 F.2d at 1219. Unlike the Ordinance in *Basiardanes,* The City of Houston Ordinance does not completely ban topless bars from advertising. It merely places limits on the number, size and detail of the signs. Regulations on the exterior portions and signage of sexually oriented businesses that serve a legitimate public interest, such as the prevention of detrimental effects on minors, are not unconstitutional. *Borrago v. City of Louisville,* 456 F.Supp. 30, 32 (W.D.Ky.1978); *see also Basiardanes,* 682 F.2d at 1219.

Plaintiffs further assert that the Ordinance's distance requirements and the manner in which they are measured by the Director are beyond the scope of minimal intrusion. Plaintiffs claim that the manner of measurement (from boundary line to boundary line) is overly broad in light of a less stringent manner of measurement in the Alcoholic Beverage Code, which also regulates Plaintiffs' distance from schools and churches. Tex.Alco.Bev.Code Ann. § 109.33 (Vernon 1978). The AB Code measures the distance requirement from the business' front door, out to the property line; following the public thoroughfares to the propery line of the school or church; and then up to its front door. Yet, the method in which a city decides to resolve apparent problems within its boundaries is not subject to constitutional attack unless it unreasonably infringes upon a protected right. Plaintiffs complain of the City's method, not because the distance leaves them no place to relocate, but on the grounds that it does not conform to the state law regulating businesses licensed under the Alcoholic Beverage Code. The Court concludes that the Plaintiffs' unhappiness with the alternate method of

measurement does not amount to a constitutional challenge. Consequently, Plaintiffs' challenge to the Ordinance on grounds of overbreadth are denied.

Plaintiffs also contend that the Ordinance is not narrowly drawn to protect first amendment interests. The City of Houston must prove that the Ordinance does not unreasonably limit alternative avenues of communication. *Renton,* 106 S.Ct. at 928. The Defendants have met their burden to demonstrate viable alternative methods of communication by showing that adequate alternative sites exist where non-conforming topless bars may relocate. Contrary to Plaintiffs' assertions, the law does not require the Defendants to confirm that the sites are economically and logistically viable, except as it relates to the restrictions in the Ordinance (750 feet from a school, church or licensed day care center, or 1000 feet from another sexually oriented business). *15192 Thirteen Mile Road, Inc. v. City of Warren,* 626 F.Supp. 803, 814 (E.D.Mich.1985); *see also Basiardanes v. City of Galveston,* 682 F.2d 1203, 1214 (5th Cir. 1982). A first amendment violation is not established by the fact that the Plaintiffs may have to "fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees . . . ." *Renton,* 106 S.Ct. at 932. "The inquiry for first amendment purposes is not concerned with economic impact." *Renton,* 106 S.Ct. at 932, *citing Young,* 427 U.S. at 84, 96 S.Ct. at 2459 (Powell, J., concurring).

Plaintiffs contend that the Ordinance causes an unlawful taking of property where existing topless clubs do not meet the application requirements. Section 5(b) grants a six-month grace period, until November 30, 1986, to existing non-conforming businesses before they are required to discontinue their operations. Ordinance § 5(b),

p. 31. Under Section 5(c), the Director "may, in his discretion, grant an extension for operation after November 30, 1986, if the owner of the existing enterprise proves that he is unable to recoup his investment in such existing enterprise by that date." Ordinance § 5(c), p. 31. There are three methods that are employed by cities to resolve nonconforming land-uses. One is to include a grandfather clause exempting existing businesses, the second method is to compensate owners for the taking of their property, and the third is to amortize the value of the property over a period of time. *See Ellwest Stereo Theatres, Incorporated of Texas v. Byrd,* 472 F.Supp. 702, 706 (N.D.Tex. 1979). The Ordinance does not characterize Section 5(b) as an amortization provision. However, the parties generally agree that Section 5(b) is an amortization clause. A general definition of amortize is the allocation of the cost or other basis of an intangible asset over its estimated useful life. *Black's Law Dictionary,* Special Deluxe 5th Edition—1979. The Ordinance does not define the term "recouping investment" used in Section 5(c). A plain meaning definition of recouping investment is to recover an expenditure, made to acquire property or other assets in order to produce revenue, by a subsequent gain. *Black's Law Dictionary,* Special Deluxe 5th Edition—1979. Amortization is regarded as a viable alternative. *Hart Book Stores, Inc., et al. v. Edministen, et al.,* 612 F.2d 821, 830 (4thCir.1979); *Lubbock Poster Co. v. City of Lubbock,* 569 S.W.2d 935 (Tex.Civ.App.1978, writ ref'd n.r.e), *cert. denied,* 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979). An Ordinance which terminates, over time, preexisting nonconforming uses should be carefully scrutinized where first amendment interests are affected. *Purple Onion, Inc., et al. v. Jackson,* 511 F.Supp. 1207, 1224 (N.D.Ga.1981). Under any set of factors, the standard for

amortizing a particular use must be reasonable and must satisfy the concerns of due process. *Art Neon Co., et al. v. City and County of Denver,* 488 F.2d 118, 121 (10th Cir. 1973); *cert. denied,* 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236 (1974).

Plaintiffs contend that the application of Sections 5(b) and (c) amount to a taking of their property without due process of law. The basis for the Plaintiffs' conclusion is that Sections 5(b) and (c) do not provide standards upon which the Director could adequately compensate them for their property. Plaintiffs also contend that amortization provisions are unfavored by the Courts because they may, in combination with other land-use restrictions, limit access to speech protected by the first amendment.

The Court is aware that some of the Plaintiffs have made large investments into their businesses. However, Section 5(b) allows those owners to recoup their investment during a six-month period. The ultimate question is whether the City's six-month amortization period is reasonable. This Court concludes that it is reasonable for several reasons. First, the Court finds that amortization is a valid method of eliminating existing nonconforming uses of land. It is generally accepted that preexisting nonconforming uses are not to be perpetual. *Validity of Provisions for Amortization of Nonconforming Uses,* 22 ALR 3rd 1134, 1141 and 1145 (1968). Use of a reasonable amortization scheme is not only a viable, but also an equitable, means of reconciliating the conflict of interest between the public and the nonconforming use. *See City of Los Angeles v. Gage, et al.,* 127 Cal.App.2d 442, 461, 274 P.2d 34, 84 (1954).

Second, with regard to adequate compensation, the Court finds the Plaintiffs' assertions unsupportable. Not

every regulation which has an adverse economic effect on businesses violates the fifth amendment as an unlawful taking. *Andrus v. Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). The Plaintiffs has six months to minimize their losses and to recoup their investments. If a sexually oriented business cannot recoup its investment within six months, Section 5(c) of the Ordinance provides an avenue for the extension of that time.

There is no specific evidence which shows that the Plainitffs will be unable to recoup their investment within six months. The 1983 Report and the 1986 Report drafted by the Committee on the Regulation of Sexually Oriented Businesses shows that no evidence was presented to the City Council on the time period necessary for sexually oriented businesses to discontinue their operations. In *Hart Book Stores* the Seventh Circuit Court of Appeals noted that amortization clauses ranging from three months to five years were constitutional. *Hart Book Stores,* 612 F.2d at 830. Where a sexually oriented business cannot recoup its investment in six months, the City has provided an added remedy. Section 5(c). The Plaintiffs contend that recouping investments is an inadequate measure of compensation. However, recoupment of investment is the major consideration in determining the reasonableness of an amortization provision. *City of University Park v. Benners,* 485 S.W.2d 773, 779 (Tex.1972).

Third, this case is unlike *Schad* or *Basiardanes* in that there are adequate alternative sites for relocation of the Plaintiffs' businesses. *See contra, Spiegel v. City of Houston,* 636 F.2d 997 (5th Cir.1981). An ordinance which otherwise has a substantial basis for its passage

does not violate due process merely because of the inclusion of an amortization clause.

Plaintiffs claim that the Ordinance violates the equal protection rights of all topless dancing bars. Where governmental action affects first amendment freedoms, that action is subject to the four prong test set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The regulation must be within the constitutional power of the government; it must further an important or substantial governmental interest; the regulation must be unrelated to the suppression of free expression; and the incidental restrictions on first amendment freedoms must be no greater than is essential to further that interest. *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. As pointed out earlier, the City has adequately met the first three prongs of the *O'Brien* test. With regard to the fourth element, various provisions of the Ordinance are subject to challenge. Section 28-123(a)(6) requires the intended operator to furnish a list of all employees or contractors involved in providing the services of the enterprise. Ordinance § 28-123(a)(6). That request infringes on first amendment freedoms without legitimate justification. While City government officials may have some legitimate interest in assuring that persons of proper age are employed within these enterprises, that interest is outweighed by the chilling or suppressive effect that Section 28-123(a)(6) would have on potential employees and contractors of topless dancing bars. Section 28-123(a)(6) is unconstitutional. *Genusa, et al, v. City of Peoria*, 619 F.2d 1203 (7th Cir.1980).

Plaintiffs contend that Section 28-123(a)(1)(i), which requires disclosure of any and all aliases of the intended

operator, is also unconstitutional as an invasion of the right to privacy. The disclosure provisions of the ordinance must be justified by the zoning interest expressed in the Ordinance. *Genusa,* 619 F.2d at 1216. The alias disclosure requirement is not justified by the City's interest in relocating topless dancing bars. Section 28-123(a)(1)(i) is therefore invalid.

Pursuant to the right to privacy, Plaintiffs claim that Section 28-125(b)(8) (which requires the applicant to have "fully complied with all state, federal and local laws or regulations affecting the conduct of its business" before receiving a permit) does not further a legitimate interest unrelated to the suppression of free expression. A similar disclosure requirement was struck down in *Genusa* where the Court of Appeals for the Seventh Circuit held that the city is required to enforce its laws and regulations in an evenhanded manner and cannot selectively enforce those laws against a bookstore because of the content of its books. *Genusa,* 619 F.2d at 1218. The same rationale applies to City Ordinance 86-323. The compliance with the other laws requirement in the Ordinance surely deals topless dancing clubs an uneven hand based solely on the content of their activities. As a result, Section 28-125(b)(8) is invalid.

Plaintiffs argue that the enabling bill, Article 2372w, of Ordinance 86-323 is invalid because its caption does not give fair notice of the content of the bill. Tex.Rev.Civ. Stat.Ann. Art. 2372w (Vernon 1979 + Supp.1985); *amended by* S.B. No. 106, 69th Leg., Reg.Sess. (Tex.1985).

> Article III, § 35 of the Texas Constitution provides:
> No bill . . . shall contain more than one subject, which shall be expressed in its title. But if any subject shall

> be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed.

TEX.CONST. art. III, § 35.

Section 35 requires that a bill's caption be specific enough to give a reader fair notice of the subject and contents of the bill. *Ex parte Crisp,* 661 S.W.2d 944, 946 *Reh'g denied,* 661 S.W.2d 956 (Tex.Crim.App.1983).

The public has a right under Texas law to be advised of the subject of each particular bill in order to prevent fraud and deception by the insertion of obnoxious clauses which might otherwise be engrafted in it and become law. *White v. State,* 440 S.W.2d 660, 664 (Tex.Crim.App.1969).

Article 2372w, the enabling statute for Ordinance 86-323, was submitted to the legislature and captioned as follows:

> An act relating to the authority of cities and counties to regulate the location of certain sexually oriented commercial activities; providing penalties.

Tex. Rev.Civ.Stat.Ann. Art. 2372w (Vernon 1979 + Supp. 1985).

Plaintiffs challenge Article 2372w on grounds that the term "sexually oriented commercial activities" is vague and that the article did not give them fair notice, at the time it was introduced, that their establishments were subject to regulation. The Court disagrees. As stated earlier in these conclusions, the term sexually oriented commercial activities is susceptible to a plain meaning definition. The title of Article 2372w sufficiently alerted the public that the subject of the article was the location regulation of

commercial businesses engaged in sexually oriented conduct. The caption of Article 2372w meets the notice requirements of Article III, Section 35.

Plaintiffs also contend that the caption of the amendment to Article 2372w did not give them fair notice that their establishments, which are licensed under the Alcoholic Beverages Code, were no longer exempt from regulation.[4] Tex.Rev. Civ.Stat.Ann. Art. 2372w (Vernon 1979 + Supp.1985) (The original 1979 Article was amended in 1985 to include sexually oriented businesses which were licensed by the Alcoholic Beverage Code). Section 35 of the Texas Constitution does not require that each caption detail all of the changes and additions of a particular amendment. *Smith v. Davis,* 426 S.W.2d 827, 833 (Tex. 1968). It only requires that the subject of the bill or amendment be expressed in the title. *Smith,* 426 S.W.2d at 833. That was done in the amendment to Article 2372w.

Plaintiffs challenge Ordinance 86-323 on grounds that it exceeds the statutory grant of Article 2372w, because the language in the Ordinance (all commercial enterprises that are sexually oriented) is broader than the language in Article 2372w. (similar commercial enterprises to massage parlors, nude studios, modeling studios and love parlors).

Article 2372w limits the power of cities to regulate the location of sexually oriented businesses to enterprises, such as "massage parlors, nude studios, modeling studios, love parlors, *and other similar commercial enterprises whose*

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4. The caption of the 1985 amendment reads: An Act relating to local regulation of certain sexually oriented business activities: providing penalties. . . . Tex.Rev. Civ.Stat.Ann. art. 2372W (Vernon 1979 + Supp 1985).

major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer (emphasis added)." Tex.Rev.Stat. Ann. Art. 2372w (Vernon 1979 + Supp.1985).

City of Houston Ordinance 86-323 (ord., p. 2) states:

> Article 2372w of the Revised Civil Statutes of the State of Texas authorizes home-rule cities to adopt, by ordinance, regulations restricting the location of commercial enterprises whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer . . .

Houston, Texas Ordinance 86-323 (March 5, 1986).

Under Texas law, no ordinance can be legally enacted by the governing body of a city which conflicts or is inconsistent with the state enabling statute. *Zachary v. City of San Antonio,* 157 Tex. 551, 305 S.W.2d 558, 561 (1957); *Berry v. City of Fort Worth,* 132 Tex. 599, 124 S.W.2d 842 (1939); *Royer v. Ritter,* 531 S.W. 448, 449 (Tex.Civ.App.—Beaumont 1975, writ ref'd n.r.e.). Article 2372w does not require the regulated business to be a massage parlor, nude studio, modeling studio or love parlor. It merely requires that the commercial enterprise be similar to those sexually oriented businesses in one respect: that the business enterprise's major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer. Plaintiffs contention that their topless dancing bars do not provide a service which is intended to provide sexual stimulation or sexual gratification to its customers is untenable. The Court concludes

that there is no conflict or inconsistency in the coverage of Ordinance 86-323 from its enabling legislation.

Plaintiffs also contend that the City of Houston is prohibited or preempted by the Texas Alcoholic Beverage Code from regulating sexually oriented businesses with liquor licenses pursuant to Ordinance No. 86-323. However, the fact that a business has a liquor license does not insulate it from other forms of municipal regulation. *Banknote Club and Stans Boilermaker v. City of Dallas,* 608 S.W.2d 716 (Tex.Civ.App.—Dallas 1980, writ ref'd n.r.e.). Ordinance No. 86-323 does not regulate the sale or possession of alcoholic beverages; conduct which is preemptive of state law. The fact that Plaintiffs can comply with the Texas Alcoholic Beverage Commission rules as to distances from churches or schools does not immunize them from other land use regulations, nor does this type of regulation conflict with the Texas Alcoholic Beverage Code, because the Ordinance does not regulate the land use of these businesses on the basis of their alcoholic use, but regulates them as a result of the secondary affects they have on surrounding areas. *Young, Wilkinson & Roberts v. City of Abilene,* 704 S.W.2d 380 (Tex.App. 11 Dist.1985, writ ref'd n.r.e.). Plaintiffs' claim of preemption must fall for the foregone reasons.

Section 3 of the Ordinance provides that "if any provision, section, subsection, sentence, clause, or phrase of this Ordinance (or the application of same to any person or set of circumstances is for any reason held to the unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected. . . ."

For the above reason, the Court's invalidation of Sections 28-123(a)(1)(i) + (a)(6) and 28-125(b)(8) does not invalidate the entire Ordinance. The above Sections shall be severed from the Ordinance.

In conclusion, the Court finds that Ordinance No. 86-323 is a valid exercise of the City of Houston's police powers. The Ordinance addresses substantial governmental interests and is tailored to affect those interests with minimal intrusion on first amendment protections. The land-use restrictions in the Ordinance are content neutral and designed to serve the City's interest in regulating sexually oriented businesses. The City's Ordinance is not unconstitutionally vague with regard to its definitions and its application. Other than the disclosure requirements noted above, the Ordinance is sufficiently narrowly drawn to meet its purpose without undue restrictions on first amendment interests: it provides for adequate compensation for preexisting non conforming businesses while serving the public interest in alleviating the adverse secondary effects of sexually oriented businesses on the surrounding community. Accordingly,

It is ORDERED, ADJUDGED and DECREED that Sections 28-123(a)(1)(i) + (a)(6) and 28-125(b)(8) are unconstitutional and the Defendants are permanently enjoined from applying those Sections.

It is further ORDERED, ADJUDGED and DECREED that Sections 28-123(a)(1)(i) + (a)(6) and 28-125(b)(8) are severed from the City of Houston Ordinance 86-323.

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs Application for a Permanent In-

junction with regard to the remaining portions of the City Houston Ordinance 86-323 is hereby DENIED.

The Clerk shall file this Order and provide a true copy to counsel for all parties.

APPENDIX I

City of Houston, Texas Ordinance
86-323 (March 5, 1986)

Mayor's Office

To the Honorable City Council of the City of Houston:

In accordance with the provisions of Article VII, Section 7 of the Charter of the City of Houston, I submit and introduce to you the ordinance set out below with the request that it be passed finally on the date of its introduction. There exists a public emergency requiring such action and I accordingly request that you pass the same if it meets with your approval.

/s/ Kathryn J. Whitmire
DATE: March 5, 1986 Mayor of the City of Houston

CITY OF HOUSTON ORDINANCE NO. 86-323

An ordinance amending Section 28-35 of the Code of Ordinances of the City of Houston, Texas by enacting a new Article III of Chapter 28; providing for the regulation of the location of certain sexually oriented businesses; providing for the regulation of the exterior portion and signage of sexually oriented businesses, adult bookstores, and adult movie theatres; making various provisions and findings related to the subject; providing for severability; and declaring an emergency.

WHEREAS, Article 1175, Section 22, of the Revised Civil Statutes of the State of Texas authorizes home-rule cities to regulate the location and control the conduct of, among other things, theatres, moving picture shows, vaudeville shows, and all places of public amusements; and

WHEREAS, Article 1175, Section 23, of the Revised Civil Statutes of the State of Texas authorizes home-rule cities to license any lawful business, occupation or calling that is susceptible to the control of the police power; and

WHEREAS, Article 1175, Section 24, of the Revised Civil Statutes of the State of Texas authorizes home-rule cities to license, regulate, control or prohibit the erection of signs or billboards as may be provided by charter or ordinance; and

WHEREAS, Article 1175, Section 34, of the Revised Civil Statutes of the State of Texas, among other things, authorizes home-rule cities to enforce all ordinances necessary to protect health, life and property, and to preserve and enforce the good government, order and security of such cities and their inhabitants; and

WHEREAS, Article 2372w of the Revised Civil Statutes of the State of Texas authorizes home-rule cities to adopt, by ordinance, regulations restricting the location of commercial enterprises whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer; and

WHEREAS, the City Council Committee on the Regulation of Sexually Oriented Commercial Enterprises heard testimony from proponents and opponents of such enterprises at public hearings held on November 4, 1982, No-

vember 11, 1982, November 22, 1982, December 15, 1982, May 25, 1983, June 1, 1983, and June 2, 1983; October 25, 1983 and

WHEREAS, the Committee on the Regulation of Sexually Oriented Commercial Enterprises has compiled its findings in a report to Council; and

WHEREAS, City Council finds that churches and schools are centers of family oriented activities and therefore enhance the quality of life in surrounding areas; and

WHEREAS, City Council finds that sexually oriented commercial enterprises can exert a dehumanizing influence on persons attending churches or schools in the surrounding area; and

WHEREAS, City Council finds that a concentration of sexually oriented commercial enterprises can contribute to a decline in the value of surrounding properties; and

WHEREAS, City Council finds that a concentration of sexually oriented commercial enterprises can contribute to an increase in criminal activities in surrounding areas; and

WHEREAS, City Council finds that a sexually oriented commercial enterprise can contribute to the impairment of the character and quality of a surrounding residential neighborhood; and

WHEREAS, City Council finds that the signs and exterior portions of sexually oriented commercial enterprises, adult bookstores, adult movie theatres and massage establishments can be detrimental to the mental health of minors viewing such signs and exterior portions; and

WHEREAS, on the basis of the foregoing findings, which are set forth in the preamble thereof and adopted therein, the City Council adopted Ordinance No. 83-1812 (now codified, as amended, as Section 28-35 of the Code of Ordinances, Houston, Texas); and

WHEREAS, the 69th Texas Legislature, 1985 adopted Senate Bill 106, which amends Art. 2372w of the Revised Civil Statutes of Texas, so that premises holding alcoholic beverage permits and licenses may be included in the scope of land use regulations adopted thereunder for sexually oriented commercial enterprises; and

WHEREAS, the City Council Committee on the Regulation of Sexually Oriented Commercial Enterprises heard testimony regarding the amendment of Ordinance 83-1812 at a public hearing on December 17, 1985; and

WHEREAS, the Committee has compiled its findings in a supplemental report to Council; and

WHEREAS, the City Council finds that the findings previously adopted remain valid; and

WHEREAS, the City Council finds that the sexually oriented commercial enterprises having alcoholic beverage licenses and permits exert the same influences on churches and schools, have the same effect on property values, and contribute in the same manner to criminal activities as do those which do not serve alcohol, and that they should be included in the scope of the land use regulations for sexually oriented commercial enterprises; and

WHEREAS, the City Council finds that sexually oriented commercial enterprises exert the same influences on day care centers as on churches and schools, and that

day care centers should be afforded the same degree of land use protection; and

WHEREAS, experience in the operation of Ordinance 83-1812 that has been gained over the past two years has demonstrated certain administrative improvements and clarifications that could be implemented; and

WHEREAS, the City Council desires to readopt the City's Sexually Oriented Commercial Enterprise regulations in order to (1) include establishments serving alcohol within the scope of land use controls (2) afford protection for day care centers and (3) effect certain administrative changes and clarifications in the operation thereof;

NOW, THEREFORE,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. That the findings and recitations set out in the preamble to this Ordinance are found to be true and correct and they are hereby adopted by the City Council and made a part hereof for all purposes.

Section 2. That Section 28-35 of the Code of Ordinances, Houston, Texas, is hereby amended to constitute Article III of Chapter 28 of the Code of Ordinances, which reads as follows:

"ARTICLE III

SEXUALLY ORIENTED BUSINESSES

Section 28-121 *Definitions.* As used in this Article, the following words and terms shall have the meanings ascribed to them in this Section, unless the context of their usage clearly indicates another meaning:

Achromatic

Colorless, lacking in saturation or hue. Without limitation, gray shall be included, but white and black shall be excluded from the definition of 'achromatic.'

Adult Bookstore

An establishment whose major business is the offering to customers of books, magazines, films or videotapes (whether for viewing off premises or on premises by use of motion picture machines or other image producing devices), periodicals, or other printed or pictorial materials which are intended to provide sexual stimulation or sexual gratification to such customers, and which are distinguished by or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities,' or 'specified anatomical areas.'

Adult Cabaret

An establishment whose major business is the offering to customers of live entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities,' or 'specified anatomical areas.'

Adult Encounter Parlor

An establishment whose major business is the provision of premises where customers either congregate, associate, or consort with employees who engage in "specified sexual activities' with or in the presence of such customers, or who display 'specified anatomical areas' in

the presence of such customers, with the intent of providing sexual stimulation or sexual gratification to such customers.

Adult Lounge

An 'adult cabaret' as defined above which is a permitted or licensed premises pursuant to the Texas Alcoholic Beverage Code where alcoholic beverages may be served or sold.

Adult Modeling Studio

An establishment whose major business is the provision, to customers, of figure models who are so provided with the intent of providing sexual stimulation or sexual gratification to such customers and who engage in 'specified sexual activities' or display 'specified anatomical areas' while being observed, painted, painted upon, sketched, drawn, sculptured, photographed, or otherwise depicted by such customers.

Adult Movie Theatre

An establishment, containing a room with tiers or rows of seats facing a screen, or projection area, whose major business is the exhibition to customers of motion pictures which are intended to provide sexual stimulation or sexual gratification to such customers and which are distinguished by or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.'

Applicant

The applicant for a permit shall be the intended operator of the enterprise.

Church

A building, whether situated within the City or not, in which persons regularly assemble for religious worship intended primarily for purposes connected with such worship or for propagating a particular form of religious belief.

Commercial Multi-Unit Center

A building or structure (including a shopping mall or strip shopping center) containing three (3) or more separate premises, each of which is offered by lease or otherwise for separate occupancy or control and each of which occupies an enclosed area having its own door or entranceway opening onto public property, a public way, or a common area.

Conduct Any Business In An Enterprise

Any person who does any one or more of the following shall be deemed to be conducting business in an enterprise:

1. operates a cash register, cash drawer or other depository on the enterprise premises where cash funds or records of credit card or other credit transactions generated in any manner by the operation of the establishment or the activities conducted therein are kept;
2. displays or takes orders from any customer for any merchandise, goods, entertainment or other services offered on the enterprise premises;
3. delivers or provides to any customer any merchandise, goods, entertainment or other services offered on the enterprise premises;
4. acts as a door attendant to regulate entry of customers or other persons into the enterprise premises; or

5. supervises or manages other persons in the performance of any of the foregoing activities on the enterprise premises.

Customer

Any person who:

(1) is allowed to enter a 'regulated establishment' in return for the payment of an admission fee or any other form of consideration or gratuity; or

(2) enters a 'regulated establishment' and purchases, rents or otherwise partakes of any merchandise, goods, entertainment or other services offered therein; or

(3) is a member of and on the premises of a 'regulated establishment' operating as a private club.

Director

The Chief of Police and such employee(s) of the Police Department as he may designate to perform the duties of the 'Director' under this Article.

Display Surface

The entire surface of a sign, on one side, devoted to exhibiting advertising. The display surface shall not include the sign frame and incidental supports thereto.

Employee

Any person who renders any service whatsoever to the customers of a 'regulated establishment' or who works in or about a 'regulated establishment' and who receives compensation for such service or work from the operator or owner of the 'regulated establishment' or from the customers therein.

Enterprise

An adult cabaret, adult encounter parlor, adult lounge, adult modeling studio, or any establishment whose major business is the offering to customers of a product or service which is intended to provide sexual stimulation or sexual gratification to such customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.' The term 'enterprise' shall not be construed to include (1) any 'adult bookstore,' or 'adult movie theatre,' as those terms are defined herein, (2) any business operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers performing functions authorized under the licenses held, (3) any business operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts, or (4) any retail establishment whose major business is the offering of wearing apparel for sale to customers.

Entertainment

Any act or performance, such as a play, skit, reading, revue, pantomime, scene, song, dance, musical rendition or striptease, whether performed by employees, agents, contractors, or customers. The term 'entertainment' shall also mean bartenders, waiters, waitresses, or other employees exposing 'specified anatomical areas' or engaging in 'specified sexual activities' in the presence of customers.

Exterior Portion

Any part of the physical structure of a 'regulated establishment,' including a wall, veneer, door, fence, roof,

roof covering, or window, which is visible from any public way or public property.

Licensed Day-Care Center

A facility licensed by the State of Texas, whether situated within the City or not that provides care, training, education, custody, treatment or supervision for more than twelve (12) children under fourteen (14) years of age, where such children are not related by blood, marriage or adoption to the owner or operator of the facility, for less than twenty-four (24) hours a day, regardless of whether or not the facility is operated for a profit or charges for the services it offers.

Operator

The manager or other natural person principally in charge of a 'regulated establishment.'

Owner or Owners shall mean the proprietor if a sole proprietorship, all partners (general and limited) if a partnership, or all officers, directors, and persons holding ten percent (10%) or more of the outstanding shares if a corporation. The term 'owner' shall not include any such person who has given to the operator a statement under oath that he does not desire to be listed on the permit application and that he waives any right to any notice that is required or permitted to be given under this Article.

Permit

A current, valid permit issued by the Director pursuant to the terms of this Article to an operator for an 'enterprise.'

Regulated Establishment

Any 'enterprise,' 'adult bookstore,' or 'adult movie theatre' as defined herein.

Residential

Pertaining to the use of land, whether situated within the City or not, for premises such as homes, townhomes, patio homes, mobile homes, duplexes, condominiums and apartment complexes, which contain habitable rooms for non-transient occupancy and which are designed primarily for living, sleeping, cooking, and eating therein. A premises which is designed primarily for living, sleeping, cooking and eating therein shall be deemed to be residential in character unless it is actually occupied and used exclusively for other purposes. Hotels, motels, boarding houses, nursing homes, hospitals, and nursery schools shall not be considered to be residential.

School

A building, whether situated within the City or not, where persons regularly assemble for the purpose of instruction or education together with the playgrounds, stadia and other structures or grounds used in conjunction therewith. The term is limited to (1) public and private schools used for primary or secondary education, in which any regular kindergarten or grades one through twelve classes are taught, and (2) special educational facilities in which students who have physical or learning disabilities receive specialized education in lieu of attending regular classes in kindergarten or any of grades one through twelve.

Sign

Any display, design, pictorial, or other representation, which shall be so constructed, placed, attached, painted, erected, fastened or manufactured in any manner whatsoever so that the same is visible from the outside of a 'regulated establishment' and that is used to seek the attraction of the public to any goods, services or merchandise available at such 'regulated establishment.' The term 'sign' shall also include such representations painted on or otherwise affixed to any exterior portion of a 'regulated establishment' as well as such representations painted on or otherwise affixed to any part of the tract upon which such a 'regulated establishment' is situated.

Specified Anatomical Areas

(1) Less than completely and opaquely covered:

(i) Human genitals, pubic region or pubic hair, or

(ii) Buttock, or

(iii) Female breast or breasts below a point immediately above the top of the areola, or

(iv) Any combination of the foregoing; or

(2) Human male genitals in a discernibly erect state, even if completely and opaquely covered.

Specified Sexual Activities

(1) Human genitals in a discernible state of sexual stimulation or arousal, or

(2) Acts of human masturbation, sexual intercourse or sodomy, or

(3) Fondling or other erotic touching of human genitals, pubic region or pubic hair, buttock or female breast or breasts, or

(4) Any combination of the foregoing.

Tract

A contiguous parcel of land under common ownership, whether situated within the City or not.

Section 28-122 *Permit Required.*

(a) It shall be unlawful for any person to own, operate or conduct any business in an enterprise located within the City unless there is a permit for the enterprise.

(b) It shall be unlawful for any person to own, operate, or conduct any business in an enterprise located within the City unless the permit is posted at or near the principal public entrance to the enterprise in such a manner that it will be conspicuous to patrons who enter the premises.

(c) In any prosecution under subsection (a) above, it shall be presumed that there was no permit at the time of the alleged offense, unless a permit was then posted as provided in subsection (b).

Section 28-123 *Permit Applications.*

(a) Applications for a permit, whether original or renewal, must be made to the Director by the intended operator of the enterprise. Applications must be submitted by hand delivery to the office of the Captain of the Vice Division of the Police Department during regular working hours (8:00 a.m. to 4:00 p.m. Monday through Friday, City holidays excepted.) Application forms shall

be supplied by the Director. The intended operator shall be required to give the following information on the application form:

(1) (i) The name, street address (and mailing address if different) and Texas Drivers License number of the intended operator, and any and all aliases; (ii) The name and street address (and mailing address if different) of the owner(s);

(2) The name under which the enterprise is to be operated and a general description of the services to be provided;

(3) The telephone number of the enterprise;

(4) The address, and legal description of the parcel of land on which the enterprise is to be located;

(5) The date on which the owner(s) acquired the enterprise for which the permit is sought, and the date on which the enterprise began operations as an enterprise at the location for which the permit is sought; and

(6) A list of all employees or contractors involved in providing the services to be provided by the enterprise.

(b) The application shall be accompanied by the following:

(1) Payment in full of a fee of (i) three hundred fifty dollars ($350) for an original application, or (ii) one hundred dollars ($100) for a renewal application, as applicable, by certified check, cashiers check or money order, which fee shall not be refundable under any circumstances;

(2) A certified copy of the assumed name certificate filed in compliance with the Assumed Business or Professional Name Act (Texas Revised Civil Statutes Annotated, Business and Commerce

Code, Chapter 36) if the enterprise is to be operated under an assumed name;

(3) If the enterprise is a Texas corporation, a certified copy of the articles of incorporation, together with all amendments thereto;

(4) If the enterprise is a foreign corporation, a certified copy of the certificate of authority to transact business in this state, together with all amendments thereto;

(5) If the enterprise is a limited partnership formed under the laws of Texas, a certified copy of the certificate of limited partnership, together with all amendments thereto, filed in the office of the Secretary of State under the Texas Limited Partnership Act (Article 6132a Vernon's Texas Civil Statutes);

(6) If the enterprise is a foreign limited partnership, a certified copy of the certificate of limited partnership and the qualification documents, together with all amendments thereto, filed in the office of the Secretary of State under the Texas Limited Partnership Act (Article 6132a Vernon's Texas Civil Statutes);

(7) Any of items (2) through (6), above shall not be required for a renewal application if the applicant states that the documents previously furnished the Director with the original application or previous renewals thereof remain correct and current.

(c) The application shall contain a statement under oath that:

(1) the applicant has personal knowledge of the information contained in the application and that the information contained therein is true and correct; and,

(2) the applicant has read the provisions of this Article.

(d) A separate application and permit shall be required for each enterprise.

Section 28-124 *Term of Permit; Renewal.*

Each permit shall be valid for a period of one year and shall expire on the anniversary of its date of issuance, unless sooner revoked, or surrendered. Each permit shall be subject to renewal as of its expiration date by the filing of a renewal application with the Director. Renewal applications must be filed at least twenty (20) days prior to the expiration date of the permit that is to be renewed.

Section 28-125 *Issuance or Denial of Permit.*

(a) Within twenty (20) days of receipt of any application, either original or renewal, the Director shall grant or deny the requested permit and give written notice to the applicant as to the decision.

(b) The Director shall issue a permit to the applicant unless one or more of the following conditions exist:

(1) The applicant's enterprise is located within 750 feet of any school, church, or licensed day care center. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of such school, church, or licensed day care center;

(2) The applicant's enterprise is located within 1000 feet of any other enterprise for which there is a

permit. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of any other enterprise;

(3) Seventy-five percent (75% or more of the tracts within a circular area, as described herein, are residential in character. The radius of such circular area shall be 1000 feet, and the center of such circular area shall correspond to the midpoint of a line joining the two most distant points on the boundary of the tract on which the enterprise is located;

(4) The applicant failed to supply all of the information requested on the application;

(5) The applicant gave materially false, fraudulent or untruthful information on the application;

(6) The applicant's enterprise is not in compliance with Section 28-129 and Section 28-130 of this Article;

(7) The application or the enterprise does not meet any other requirement of this Article;

(8) The applicant has not fully complied with all State, Federal and local laws or regulations affecting the conduct of its business; or

(9) The operator has had a permit revoked for the same enterprise within the one hundred eighty (180) day period next preceding the date that the application was filed.

(c) Property uses and distances for original applications shall be determined as of the time that the application is filed. If a renewal application is timely filed as provided in Section 28-124, the property uses and measurements for the renewal application shall be determined as

of the time that the original application for the enterprise was filed. If not timely filed, renewal applications shall be subject to the same fees and shall be treated in the same manner in all respects as original applications.

(d) In the event that the Director determines that an applicant is not eligible for a permit, the applicant shall be given notice in writing of the reasons for the denial within 20 days of the receipt of its application by the Director. An applicant may appeal the decision of the Director regarding such denial by filing a written request for a hearing with the Director within fifteen (15) days after he is given notice of such denial. The Director's decision on the application shall be final unless an appeal is timely filed. An appeal shall not stay the Director's decision on the issuance of a permit. The applicant's written request for a hearing shall set out the grounds on which the denial is challenged. The hearing shall be conducted by a hearing official to be designated by the Director. The hearing official shall not have participated in any investigation or decision relating to the denial of the permit. At the hearing the hearing official shall receive oral and written testimony regarding the application. Hearings shall be conducted under rules issued by the Director, which shall be consistent with the nature of the proceedings and shall ensure that each party may present evidence, cross-examine witnesses and be represented by legal counsel.

(e) The hearing official shall conduct the hearing within fifteen (15) days after receipt of the applicant's written request for a hearing unless the applicant requests an extension in writing. The hearing official shall ren-

der a written decision and issue notice thereof to the applicant within five (5) days after the conclusion of the hearing. The written decision of the hearing official shall be final unless an appeal is filed to City Council pursuant to Section 28-125(f).

(f) The applicant may appeal the decision of the hearing official to City Council by filing a written notice of appeal with the City Secretary within fifteen (15) days after the applicant is given notice of the hearing official's decision. The notice of appeal shall be accompanied by a memorandum or other writing setting out fully the grounds for such appeal and all arguments in support thereof. The Director may submit a memorandum in response to the memorandum filed by the applicant on appeal to City Council. After reviewing such memoranda, as well as the hearing official's written decision, and the exhibits introduced at the hearing before the hearing official, City Council shall vote to either uphold or overrule the hearing official's decision. Such vote shall be taken within fourteen (14) calendar days after the date on which the City Secretary receives the notice of appeal. However, all parties shall be required to comply with the hearing official's decision during the pendency of the appeal. The decision of the City Council shall be final.

(g) Failure of the Director to give timely notice of his action on an application, or failure of the hearing official to timely conduct or give notice of his decision on an appeal from the Director's decision, or failure of City Council to vote on an appeal from the decision of the hearing official within the limitations of time specified above, shall entitle the applicant to the issuance of temporary

permit upon written demand therefor filed by the applicant with the Director. Such a temporary permit shall only be valid until the third day after the Director gives notice of his action on the application or the hearing official gives notice of this decision on the appeal, or the City Council votes on the appeal, as applicable.

Section 28-126 *Transfer upon change.*

(a) A permit is personal to the owner(s) and operator designated in the application, provided it may be transferred pursuant to this Section. A transfer application must be filed by the tenth day next following any change of the owner(s) or operator designated on the application. In the event that a transfer application is not timely filed, then the permit shall be invalid for any purpose relating to the operation of the enterprise, and any transfer shall require and be treated all respects as an original permit application. For purposes of measurements between enterprises under Section 28-125(b)(2) of this Code, an establishment for which the permit has become invalid by operation of this Section shall be treated as though it had a permit until the permit is revoked pursuant to Section 28-127 of the Code and any appeal therefrom to the City Council has been concluded.

(b) The Director shall prescribe a form on which permit transfer applications shall be made. The form shall include a statement under oath that the original application remains correct as previously submitted in all respects except those that are amended hereby. The transfer application shall contain a statement under oath that the individual signing the transfer application has personal knowledge of the information contained therein and

that the information is true and correct and shall not be complete unless accompanied by a nonrefundable transfer fee of one hundred dollars ($100.00). Transfer applications shall be filed in the same place and at the same time as original applications and the fee shall be payable in the same manner as for original applications, as provided in Section 28-123 of this Code.

(c) Transfers shall be reviewed, issued and subject to appeal in the same manner as original applications, pursuant to Section 28-125, except that items (1), (2), and (3) of Subsection (b) shall not apply, and they shall be issued for the remaining term of the permit to be transferred.

Section 28-127 *Revocation or Suspension of Permit.*

(a) The Director shall have the authority to revoke a permit for any one or more of the following reasons:

(1) The owner or operator of the permitted enterprise knowingly allowed a person under seventeen (17) years of age to enter an enterprise;

(2) The permitted enterprise does not conform to the provisions of Section 28-129 and Section 28-130 of this Article;

(3) Three (3) or more cumulative violations of any of the offenses contained in Chapter 21, Chapter 43, Section 22.011, or Section 22.021 of the Texas Penal Code or of the offenses contained in this Article have occurred on the premises of the permitted enterprise. These violations must have occurred in a consecutive period of twelve months, and the owner or operator must have knowingly allowed such violations to occur or did not make a reasonable effort to prevent the occurrence of such violations;

(4) The operator of the permitted enterprise gave materially false, fraudulent or untruthful information on the original, renewal or transfer application form;

(5) The enterprise has been closed for business for a period of thirty (30) consecutive days, unless such closure is due to circumstances beyond the control of the owner, and the owner is proceeding with due diligence, given all attendant circumstances, to reopen the establishment;

(6) That there was a change of owner or operator for which a transfer application was not timely filed pursuant to Section 28-126 of this Article; or

(7) That the permit should not have been issued pursuant to the criteria of Section 28-125 of this Article.

(b) Prior to revocation of a permit, the Director shall investigate the grounds alleged to determine whether probable cause for revocation may exist and if so, shall notify the owner(s) and operator in writing of reasons for the proposed revocation and grant such owner(s) and operator the opportunity to appear before a hearing official to be designated by the Director at a time and place specified within such notice. The hearing official designated shall not have participated in any investigation of the alleged grounds for the revocation. Such hearing shall be held not less than fifteen (15) days after the notice is given. Hearings shall be conducted under rules issued by the Director. Such rules shall be consistent with the nature of the proceedings and shall ensure that each party may present evidence, cross-examine witnesses and be represented by legal counsel. If, after the hearing, the hearing official finds that the permit should be revoked, he shall

issue a written order revoking such permit which shall be effective on the third day after notice thereof is given to the operator. If the hearing officer determines, based upon the nature of the violation, that the ends of justice would be served by a suspension in lieu of a revocation, he may suspend the operation of the permit for a period of time to be stated in the order of suspension, not to exceed two (2) months; however, a suspension may not be ordered if the grounds are based upon item (6) or (7) of Subsection (a), above.

(c) The owner(s) or operator shall have the right to appeal an order of the hearing official revoking a permit to the City Council in accordance with the procedure set forth in Section 28-125(f) by delivering notice of appeal to the City Secretary within fifteen (15) days after notice is given to the owner(s) and operator of the order. The filing of an appeal of a revocation to the City Council shall not have the effect of superseding or suspending the order of the Director. Orders suspending permits shall not be subject to any appeal.

(d) An enterprise shall be treated as having a permit for purposes of measurements under Section 28-125(b)(2) of this Code, pending the date for filing an appeal of a permit revocation, and if an appeal is filed, pending the disposition of the appeal by the City Council. An establishment holding a suspended permit shall be treated as treated as having a permit for the purpose of measurements made under Section 28-125(b)(2).

Section 28-128 *Other Permit Provisions.*

(a) A permit is valid only at the location for which it is issued.

(b) It shall be unlawful for any person to counterfeit, forge, change, deface, or alter a permit.

(c) A permit may be cancelled upon written request of the owner(s) or operator and surrender of the permit itself to the Director. Permits shall be surrendered at the same place and at the same time as permit applications as provided in Section 28-123 of this Code. The surrender of a permit shall be effective upon its filing in the office of the Captain of the Vice Division.

Section 28-129 *Exterior Portions of Regulated Establishments.*

(a) It shall be unlawful for an owner or operator of a regulated establishment to allow the merchandise or activities of the regulated establishment to be visible from any point outside such regulated establishment.

(b) It shall be unlawful for the owner or operator of a regulated establishment to allow the exterior portions of the regulated establishment to have flashing lights, or any words, lettering, photographs, silhouettes, drawings, or pictorial representations of any manner except to the extent permitted by the provisions of this article.

(c) It shall be unlawful for the owner or operator of a regulated establishment to allow exterior portions of the regulated establishment to be painted any color other than a single achromatic color. This provision shall not apply to any regulated establishment if the following conditions are met:

(1) the regulated establishment is a part of a commercial multi-unit center; and

(2) the exterior portions of each individual unit in the commercial multi-unit center, including the exterior portions of the regulated establishment are painted the same color as one another or are painted in such a way so as to be a component of the overall architectural style or pattern of the commercial multi-unit center.

(d) Nothing in this Article shall be construed to require the painting of an otherwise unpainted exterior portion of a regulated establishment.

Section 28-130 *Signage.*

(a) Notwithstanding Chapter 46 of the Building Code or any other City Ordinance, Code, or regulation to the contrary, it shall be unlawful for the owner or operator of any regulated establishment or any other person to erect, construct, or maintain any sign for the regulated establishment other than one 'primary sign' and one 'secondary sign,' as provided herein.

(b) Primary signs shall have no more than two (2) display surfaces. Each such display surface shall:

(1) not contain any flashing lights;

(2) be a flat plane, rectangular in shape;

(3) not exceed seventy-five (75) square feet in area; and

(4) not exceed ten (10) feet in height or ten (10) feet in length.

(c) Primary signs shall contain no photographs, silhouettes, drawings or pictorial representations of any manner, and may contain only:

(1) the name of the regulated establishment and/or

(2) one or more of the following phrases:

(i) 'Adult Bookstore'

(ii) 'Adult Movie Theatre'

(iii) 'Adult Encounter Parlor'

(iv) 'Adult Cabaret'

(v) 'Adult Lounge'

(vi) 'Adult Novelties'

(vii) 'Adult Entertainment'

(viii) 'Adult Modeling Studio'

(3) Primary signs for Adult Movie Theatres may contain the additional phrase, 'Movie Titles Posted on Premises.'

(d) Each letter forming a word on a primary sign shall be of a solid color, and each such letter shall be the same print-type, size and color. The background behind such lettering on the display surface of a primary sign shall be of a uniform and solid color.

(e) Secondary signs shall have only one (1) display surface. Such display surface shall:

(1) be a flat plane, rectangular in shape;

(2) not exceed 20 square feet in area;

(3) not exceed five (5) feet in height and four (4) in width; and

(4) be affixed or attached to any wall or door of the establishment; and

(f) The provisions of item (1) of Subsection (b) and Subsections (c) and (d) shall also apply to secondary signs.

Section 28-131 *Persons Younger than 17 Prohibited from Entry; Attendant Required.*

(a) It shall be unlawful to allow a person who is younger than seventeen (17) years of age to enter or be on the premises of a regulated establishment at any time that the regulated establishment is open for business.

(b) It shall be the duty of the operator of each regulated establishment to insure that an attendant is stationed at each public entrance to the regulated establishment at all times during such regulated establishment's regular business hours. It shall be the duty of the attendant to not allow any person under the age of seventeen (17) years to enter the regulated establishment. It shall be presumed that an attendant knew a person was under the age of seventeen (17) unless such attendant asked for and was furnished (1) a valid operator's, commercial operator's, or chauffeur's driver's license, or (2) a valid personal identification certificate issued by the Texas Department of Public Safety reflecting that such person is seventeen (17) years of age or older.

Section 28-32 *Notices.*

(a) Any notice required or permitted to be given by the Director or any other City office, division, department or other agency under this Article to any applicant, operator or owner of an enterprise may be given either by personal delivery or by certified United States mail, postage prepaid, return receipt requested, addressed to the most recent address as specified in the application for the permit, or transfer application which has been received by the Director, or any notice of address change which has been

received by the Director. Notices mailed as above shall be deemed given upon their deposit in the United States mail. In the event that any notice given by mail is returned by the Postal Service, the Director shall cause it to be posted at the principal entrance to the establishment.

(b) Any notice required or permitted to be given to the Director by any person under this Article shall not be deemed given until and unless it is received in the office of the Captain of the Vice Division at the time(s) and in the manner provided for filing of applications in Section 28-123(a) of this Code.

(c) It shall be the duty of each owner who is designated on the permit application and each operator to furnish notice to the Director in writing of any change of residence or mailing address.

Section 28-133 *Violation Deemed Misdemeanor; Continuing Violations.*

Violation of any provision of this Article that is not otherwise punishable pursuant to Article 2372w, Texas Revised Civil Statutes, as amended, shall be punishable by a fine of not less than one hundred fifty dollars ($150) nor more than two hundred dollars ($200). Each day any violation continues shall constitute and be punishable as a separate offense.

Section 28-134 *Authority to File Suit.*

The City Attorney is hereby authorized to file suit to enjoin the violation of this Article."

Section 3. If any provision, section, subsection, sentence, clause, or phrase of this Ordinance, or the application of same to any person or set of circumstances is for

any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

Section 4.

(a) This Ordinance shall take effect on June 3, 1986; provided that the Director shall forthwith proceed to accept applications and issue permits pursuant to the terms of Section 2, above, in accordance with the procedures established in this Section 4. Such permits, if granted, shall be dated June 3, 1986.

(b) Any operator of an enterprise who desires to continue its operation on or after June 3, 1986, or any person who desires to establish an enterprise that will be in operation on June 3, 1986, shall file a permit application with the Director on or before April 4, 1986. If the enterprise is in existence and operation, then the applicant shall furnish evidence with the application in the form of business records and other relevant documents which will set forth and establish the length of time that the enterprise has been in continuous business operation as an enterprise at the location applied for, whether under its present name and ownership or a previous name and ownership, without a closure of thirty consecutive days

or more, extending through the date of the permit application ("term of operation").

(c) Applications received by April 4, 1986, for enterprises that are already in operation shall be the first considered. They shall be considered in the order of their terms of operation as determined from the records submitted, so that precedence in measuring any required distances between enterprises shall be given to the enterprise with the longest term of operation. Applications received by April 4, 1986, for enterprises not already in operation shall next be considered in the order of their filing with the Director.

(e) The Director shall give notice of the approval or denial of all applications received on or before April 4, 1986, by May 5, 1986. Applicants may appeal from the decision of the Director as provided in Section 28-125(d) through (f) of the Code of Ordinances. In any such appeal an applicant may, in his notice of appeal, specifically question the Director's determination of the term of operation of another enterprise to the extent that such determination formed the basis for the denial of his application. In such event the operator and owners of the other enterprise shall each be given notice of the hearing and afforded an opportunity to appear therein in defense of the records they submitted to the Director.

(f) The Director shall issue permits to all applicants meeting the requirements of Chapter 28, Article III of the Code of Ordinances who timely file their applications on or before April 4, 1986, by May 27, 1986. A temporary permit may be issued in the same manner as authorized in Section 28-125(g) of the Code of Ordinances,

pending the disposition of the appeal, in any instance in which a permit may potentially have to be withdrawn, should the City Council overrule the Director's denial of another permit application which is on appeal.

(g) Permit applications that are filed after April 4, 1986, and prior to May 14, 1986 shall be held by the Director until May 14, 1986 and shall then be considered in the order of their filing with the Director and in accordance with Section 28-125 of the Code of Ordinances. Permit applications filed on or after May 14, 1986 shall be considered in the order of their filing in accordance with Section 28-125.

Section 5.

(a) The provisions of this Section shall only apply to:

(1) any adult lounge that is in business as an adult lounge on March 5, 1986, and is operating at the same location where it was situated on that date, and

(2) any enterprise of any other type for which a current valid permit is in effect as issued under Section 28-35 (formerly Section 28-73) of the Code of Ordinances on March 5, 1986, and which is operating at the same location where it was situated on that date;

provided that an application is filed for a permit to continue the operation of the business pursuant to Section 4, above on or before April 4, 1986. The term "existing enterprise" as used in this Section shall be so limited in its construction.

(b) an existing enterprise may remain in business, even if the permit application is denied, until November 30, 1986.

(c) The Director may, in his discretion, grant an extension for operation after November 30, 1986, if the owner of the existing enterprise proves that he is unable to recoup his investment in such existing enterprise by that date. In order to secure an extension of time, the owner must submit to the Director a written request for such extension on or before September 1, 1986. No application for extension received by the Director after September 1, 1986 shall be considered. Such written request shall set forth the following information:

(1) the amount of the owner's investment in the existing enterprise through March 5, 1986;

(2) the amount of such investment that has been or will be realized through November 30, 1986;

(3) the life expectancy of the existing enterprise;

(4) the existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such lease.

This information shall be supported by relevant documentary evidence such as financial statements and tax records. Copies of such documentary evidence must be attached to the request for extension.

(d) The Director shall notify an applicant for an extension of time of the time and place of a hearing to be held on such request before the Director or a hearing official that he may designate. After such hearing, the Director or hearing official shall issue a written order on

the request for extension. If the owner desires to appeal the Director's order, he may do so by following the procedure set forth in Section 28-125(f) of the Code of Ordinances. Extensions that are granted shall specify a date certain for closure, and shall not be valid for operation at any other location.

(e) Existing enterprises that remain in operation pursuant to subsection (b) or pursuant to an extension granted pursuant to subsections (c) and (d) shall not be considered as having a permit for purposes of measurement of distances between enterprises as required pursuant to Section 28-125(b)(2) of the Code of Ordinances.

Section 6. Permits issued prior to June 3, 1986, pursuant to Section 28-35 of the Code of Ordinances (formerly Section 28-73 of the Code of Ordinances) shall become invalid on June 3, 1986. Owners or operators of establishments holding permits thereunder who wish to remain in business on or after June 3, 1986 must apply for a new permit under this Ordinance as provided in Section 3, above. The fee therefor shall be that established for an original application, provided the applicant shall be entitled to a credit equal to one dollar ($1) for each day remaining in the term of the permit issued under Section 28-35. The credit shall be calculated as of June 3, 1986.

Section 7. Any extension granted by the Director of Finance and Administration for the removal of a sign under Ordinance No. 83-1812 [Section 28-35 (formerly Section 28-73) of the Code of Ordinances] shall remain valid for the term of such extension.

Section 8. There exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction; therefore, this Ordinance shall be passed finally on such date and shall take effect as provided in Section 4 above.

FILED
JUL 27 1988

NO. 87-2052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

M.E.F. ENTERPRISES, INC. and
M.K.D. ENTERPRISES, INC.,
Petitioners

v.

THE CITY OF HOUSTON, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Fifth Circuit properly apply the holding in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) to a City of Houston ordinance regulating the location, exterior color and signage of sexually oriented businesses?

LIST OF PARTIES

Petitioners:

M.E.F. Enterprises, Inc. and M.K.D. Enterprises, Inc.

Respondents:

The City of Houston, Texas

Jerry E. Smith, in his official capacity as City Attorney of the City of Houston, Texas.

Lee P. Brown, in his official capacity as Chief of Police for the City of Houston, Texas.

The following is a list of all parties of record in the proceedings in the United States Court of Appeals for the Fifth Circuit who are not parties to the proceedings before this Court:

SDJ, Inc., d/b/a Sugar Babes; W.F.K., Inc. d/b/a Sugar's; W.F.K., Inc. Six d/b/a Sugar's Dejavu; T.D.D., Inc. d/b/a Little Darlings; Evan Lowenstein d/b/a Legacy; Gringo's Saloon, Inc. d/b/a Fantasia; 747, Inc. d/b/a Texas Cowgirls; Two Greeks, Inc. d/b/a Candlelite Lounge; M.B. Tex Enterprises, Inc. d/b/a Imaginations; Spiros Karmaelegos d/b/a Texas Fillies; HI-10, Inc. d/b/a HI-10 Cabaret; Trumps, Inc. d/b/a Rick's Cabaret; Southwest Club Co., Inc. d/b/a Playmates; SSD, Inc. d/b/a Ritz Cabaret; Aris Mylonas d/b/a Bogey's; Jimmy Tsarouchas d/b/a Cricket's; J&J, Inc. d/b/a Pink Pussycat; VAT, Inc. d/b/a Yellow Rose of Texas; Alexandria Vivi Barsakis d/b/a Whip Club; Da John, Inc. d/b/a Dream Street.

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NO. 87-2052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

M.E.F. ENTERPRISES, INC. and
M.K.D. ENTERPRISES, INC.,
Petitioners

v.

THE CITY OF HOUSTON, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the City of Houston, Texas, its City Attorney, Jerry E. Smith and its Police Chief Lee P. Brown, in their official capacities, respectfully requested that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case reported as *S.D.J., Inc. v. City of Houston,* 837 F.2d 1268, rehearing denied 841 F.2d 107 (5th Cir. 1988).

The opinion of the District Court is reported as *S.D.J., Inc. v. City of Houston,* 639 F. Supp. 1359 (S.D. Tex. 1986). All of these opinions are reprinted in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves the constitutionality of a local ordinance regulating the location, exterior decor and signage of sexually oriented businesses. The ordinance provides for the licensing of certain sexually oriented businesses, including topless bars, and regulates their location. The ordinance does not regulate the location of adult bookstores or adult movie theatres, but does regulate the exterior decor and signage of those businesses.[1] A sexually oriented business regulated as to location cannot qualify for a license if it is located within 750 feet of a church, school or licensed day care center. Additionally, a sexually oriented business cannot be located within an area that is more than 75% residential in character. Finally, the ordinance provides that no sexually oriented businesses may be located within 1000 feet of another sexually oriented business. The Petitioners are two corporations owning topless bars subject to the regulations.

The Court of Appeals' opinion correctly states the facts in this case. *S.D.J., Inc. v. City of Houston,* 837 F.2d 1268, 1272-1273. However, Petitioners' Statement of the Facts is incomplete and, to a degree, misleading. Contrary to the Petitioners' assertions, the ordinance was

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1. "A state enabling statute, Tex. Rev. Civ. Stat. Ann. art. 2372w, prohibited the city's regulation of the excepted businesses." *S.D.J., Inc. v. City of Houston,* 837 F.2d 1268, 1272 (5th Cir. 1988). Article 2372w has been recodified as Chapter 243 of the Texas Local Government Code.

enacted only after careful study of local concerns with the secondary effects of adult businesses and after a review of other cities' approaches to solutions to this problem. *S.D.J., Inc. v. City of Houston,* 837 F.2d 1268, 1271.

In addition, expert testimony received by the district court which, together with the legislative reports of the City Council Committee charged with studying the effects of adult businesses on surrounding property, was sufficient to establish that topless bars have an adverse impact on residential property, churches, schools and day care centers. *S.D.J., Inc. v. City of Houston,* 636 F. Supp. 1359, 1367 (S.D. Tex. 1986).

Finally, along with examining the potential adverse effects that topless bars have upon the surrounding land uses, the City Council Committee also examined the effect that the distance regulations would have upon the availability of topless entertainment in Houston. As the Fifth Circuit noted, "[s]everal experts testified as to potential alternative sites, estimating that 'at least 100' and perhaps up to 'tens of thousands' of alternative sites exist." *S.D.J., Inc.,* 837 F.2d at 1277.

REASONS THE PETITION SHOULD BE DENIED

The Fifth Circuit correctly applied the holding in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), to the facts of this case.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court reexamined the constitutional requirements for local zoning ordinances which regulate the location of adult businesses. *Renton* held

that content-neutral time, place and manner regulations which restrict the location of adult businesses are constitutional so long as they serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *Renton,* 106 S. Ct. at 928, citing *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 297 (1984); *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 807 (1981); and *Heffron v. International Society for Krishna Consciousness, Inc.,* 458 U.S. 640 (1981).

In *Renton,* the Court concluded that a local ordinance which was aimed at controlling the secondary effects of adult businesses on the surrounding community rather than at the content of the films would qualify as "content-neutral." *See also, Young v. American Mini Theatres,* 427 U.S. 50, 70 (1976). In addition, this Court held that an ordinance that was "narrowly tailored" to affect only that category of business shown to produce the unwanted secondary effects would be constitutional and avoid the infirmities found in the overbroad ordinances which were struck down in *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975).

In *Renton,* the Court held that the fact that the owners of adult businesses must "fend for themselves in the real estate market on an equal footing with other prospective purchasers and lessees does not give rise to a First Amendment violation." *Renton,* 106 S. Ct. at 932. The Court also observed that the First Amendment did not compel local government to provide that speech related businesses, or any other businesses, would be able to obtain sites at bargain prices. The inquiry for First Amendment purposes is not concerned with economic impact. *Renton,* 106 S. Ct. at 932.

The Houston ordinance meets each of these tests. First the Houston ordinance is "content-neutral" in that its predominate concern is with the secondary effects of topless bars.[2] Second, the ordinance is "narrowly tailored" to serve the governmental interests at issue—maintaining neighborhood stability and the quality of life within the City of Houston. The Houston ordinance is not overbroad because it does not reach further than necessary in scope and regulate in a manner unrelated to the governmental interests to be achieved. It only regulates those businesses which have the undesired secondary effects on the surrounding property that the ordinance attempts to mitigate. Third, the Houston ordinance provides for adequate alternative areas of communication by allowing for sufficient available sites for the operation of sexually oriented businesses throughout the City of Houston.

A. The Houston ordinance is content-neutral because it addresses the secondary effects of protected conduct.

The Houston ordinance was passed only after extensive hearings where the City Council reviewed the views of the public and experts regarding the effect of sexually oriented businesses on the surrounding property. (*See,* Preamble to Ordinance No. 86-323, Appendix C to Petition for Writ of Certiorari, pp. 60-63.) These findings contained in the Preamble demonstrate that the City Council's predominate concern was with the secondary effects of topless bars and other sexually oriented businesses, not with the content of the protected

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2. As the Fifth Circuit noted, "[t]he record reflects that the City Council carefully considered the relationship between sexually oriented businesses and neighborhood effects." *S.D.J., Inc.*, 837 F.2d at 1274.

activity. The target of the ordinance was not speech, but the secondary effects of speech, *i.e.*, prevention of crime, maintenance of property values and protection of residential neighborhoods. Because the ordinance is principally concerned with these secondary effects of adult businesses, it is content-neutral and therefore not subject to strict scrutiny as is a content-based regulation. *Renton*, 106 S. Ct. at 929-930.

Petitioners' argument that the Houston ordinance is content-based centers upon an erroneous reading of this Court's recent opinion is *Boos v. Barry*, ____U.S.____, 107 S. Ct. 1157 (1988). That case involved a constitutional challenge to a section of the District of Columbia code which prohibited the display of a sign within 500 feet of a foreign embassy if the sign tended to bring the foreign government into "public odium" or "public disrepute." This Court found that the District of Columbia regulation was content-based because it focused upon the "direct impact" of the speech. *Boos v. Barry*, 108 S. Ct. at 1163. The Court distinguished *Renton* on the basis that "listeners reactions are not the type of 'secondary effects' we referred to in *Renton*." *Boos v. Barry*, 108 S. Ct. at 1163.

Petitioners argue that the Houston regulations focus on the "direct impact" of the speech by asserting that there is a functional equality between "psychological damage" as used in the hypothetical example in *Boos v. Barry* and "dehumanizing influence" as contained in the preamble to the Houston ordinance. This argument ignores the totality of the findings of City Council.[3] The

3. The City Council found that "churches and schools are centers of family oriented activities and therefore enhance the quality of life in surrounding areas" and that "sexually oriented commercial

ordinance was not justified by the desire to prevent any "dehumanizing influence" associated with viewing topless dancers but rather with the effects these businesses have on the surrounding land uses. In contrast, the District of Columbia regulation at issue in *Boos v. Barry* was concerned with preserving the "dignity" of foreign diplomats by shielding them from speech critical of their governments. Here, the Houston ordinance attempts to control the secondary effects of adult businesses rather than control the activities occurring inside of these businesses.[4]

B. The Houston ordinance is narrowly tailored to effectively promote the City's interests in the preservation of the stability of its neighborhoods.

The topless bars argue that the Fifth Circuit's application of the *Renton* decision to the Houston ordinance is in conflict with *City of Watseka v. Illinois Public*

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enterprises can contribute to the impairment of the character and quality of a surrounding residential neighborhood." Additionally, the City Council found that "sexually oriented businesses can contribute to a decline in the value of surrounding properties" and that "sexually oriented commercial enterprises can contribute to an increase in criminal activities in surrounding areas." (*See,* Appendix C to Petition for Writ of Certiorari, p. 61.)

4. The City of Houston has a substantial governmental interest in protecting minors from the possible adverse effects of viewing signs and exterior portions of sexually oriented businesses and in preventing and minimizing the contribution of these signs and exterior portions to the potential decrease in the value of the surrounding property. This interest is both strong and legitimate, *see, Basiardanes v. City of Galveston,* 682 F.2d 1203, 1219, and is especially keen when minors are involved. *See, New York v. Ferber,* 458 U.S. 747 (1982). The provisions of the Houston ordinance affecting the exterior portion and signage of sexually oriented businesses are valid as long as they are directed at the signs themselves rather than at the protected activities. *Borrago v. City of Louisville,* 456 F. Supp. 30, 32 (W.D. Ky. 1978).

Action Counsel, 796 F.2d 1547 (7th Cir. 1986), judg. affirmed ____U.S.____, 107 S. Ct. 919 (1987). They assert that the ordinance must, consistent with this later opinion, be "narrowly tailored" as determined by the "least restrictive means" test and that therefore the City is limited to regulating the exterior signage and color of topless bars.[5]

Petitioners reliance on *Watseka* ignores the precedential value of a number of recent Supreme Court cases: *United States v. Albertini,* 472 U.S. 676 (1985); *Regan v. Time, Inc.,* 468 U.S. 641 (1984); *Community for Creative Non-Violence,* 468 U.S. 288 (1984); and *City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 808-810 (1981). Each of these cases directly addressed the applicability of the least restrictive means analysis and rejected it when applied to content-neutral regulation.[6] In fact, *Renton* itself eschews this analysis.

These cases recognized that once the governmental interest is identified the task of the reviewing court is to determine if the regulation is sufficiently narrow to avoid an overbreadth challenge and effectively promote the governmental interest.[7] As the Fifth Circuit pointed

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5. The Petitioners have seemingly dropped their argument advanced in the Court of Appeals that "the City must prove that 750 feet as opposed to some other distance is necessary to serve the City's interest." *S.D.J., Inc.,* 837 F.2d at p. 1275.

6. "The less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place and manner regulation. It is enough that the restriction substantially serve the government's legitimate ends." *Regan v. Time, Inc.,* 468 U.S. at 657.

7. Indeed, just this last term, this Court again recognized that "a statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz,* ____U.S.____, 56 U.S. Law Week 4785, 4788 (1988).

out, the fact that three Justices dissented from the summary affirmance in *Watseka* does not indicate that this Court has adopted the least restrictive means analyses as applied to adult business. *S.D.J., Inc.*, 841 F.2d 107, 109 (5th Cir. 1988). That inference could have been drawn only if the least restrictive means approach had been "essential to the affirmance and consistent with the Court's decisions in prior cases." *S.D.J., Inc.*, 841 F.2d at 109.[8]

It is axiomatic that the City of Houston has a legitimate interest in addressing societal concerns regarding crime, urban deterioration, neighborhood stability and the quality of life. *City of Renton*, 106 S. Ct. at p. 929; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 75 (1976). This governmental interest in preventing the adverse secondary effects of sexually oriented businesses is a constitutionally valid basis for subjecting such businesses to land use regulation. The Houston ordinance goes no further than necessary in scope in that it does not regulate interests unrelated to the concerns that it addresses. Unlike the ordinance at issue in *Schad v. Borough of Mount Ephraim*, the Houston ordinance does not ban all live entertainment. In fact, the Houston ordinance does not totally ban topless bars from the City, but merely regulates their location.

Petitioner asserts that because the City has regulated the number and amount of signs and the color of sexually oriented businesses that, under a least restrictive means analysis, this is as far as the regulation needs to extend.

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8. When the least-restrictive means analysis has been applied to regulations involving restrictions on protected activity it has usually been applied in the context of a total ban on an activity. *Cf. Schad v. Borough of Mount Ephriam*, 452 U.S. 61 (1981) (total ban on live entertainment); *City of Watseka*, 796 F.2d at p. 1557 (total ban on nighttime solicitation.)

This argument ignores the fact that the signage and exterior color restrictions are related to a particular secondary effect that these externalities of sexually oriented businesses have on minors.

While restrictions on exterior portions which allow modest, subdued advertising are appropriate in order to prevent a decline in the value of surrounding properties and thus prevent deterioration of neighborhoods, they may not address the issue of increased criminal activity as well as locational restrictions. Finally, both the signage and location requirements promote and further the government's preservation of property values and prevention of neighborhood deterioration.

C. The Houston ordinance provides for ample alternative avenues of communication.

The Fifth Circuit determined whether the Houston ordinance allows "ample alternative avenues of communication" by directing its inquiry into whether the ordinance refrains from effectively denying Petitioners a reasonable opportunity to open and operate a topless bar. *S.D.J., Inc.*, 837 F.2d at 1278. As the Fifth Circuit noted:

> Several experts testified as to potential alternative sites, estimating that 'at least 100' and perhaps up to 'tens of thousands' alternative sites exist. The 40 sites to which plaintiffs refer are those identified by one expert who studied approximately 20% of the City of Houston. Undoubtedly, other sites exist in the remaining 80% of the City. *S.D.J., Inc.*, 837 F.2d at 1277.

Petitioners' attempt to avoid this finding by arguing that the analysis undertaken was in conflict with the

holdings of this Court in *Young v. American Mini Theatres, Schad v. Borough of Mount Ephraim,* and *City of Renton.* While couched in terms that would indicate that the lower courts ignored the teachings of these three cases, Petitioners argument is little more than quibbling over whether or not the space is available.[9]

Renton and *Young* emphatically hold that the focus of the "ample alternative means of communication" prong of the First Amendment analysis to be applied to ordinances regulating the location of adult business is satisfied if "government refrains from effectively denying protected businesses a reasonable opportunity to locate within a community." *Renton,* 106 S. Ct. at 932. The testimony in the case *sub judice* makes it clear that the locations for sexually oriented businesses are adequate both in terms of numbers and character of land. Indeed, the sites identified included shopping centers, free standing buildings and raw undeveloped land on major thoroughfares throughout the City. (Tr. Vol. V, pp. 208-210, 216; *Area Maps,* Dx. Nos. 14 through 33.)

Petitioners finally argue that the Houston ordinance is unconstitutional because it does not contain a "grandfather" clause exempting existing business. The fact that the ordinance applies to existing businesses does not provide a reason for its invalidation. The test as to whether an ordinance regulating the location of a business engaged in First Amendment activities is a valid time, place and

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9. Petitioners reliance on a mathematical analysis is misplaced. The fact that the City of Renton, Washington has a population of 15,000 and room for 400 adult theaters is hardly relevant. Nor is a comparison of the percentage of land that may be utilized by adult businesses in Renton, Washington and Houston, Texas. The test is simply whether the City has refrained from denying Petitioners an opportunity to locate with the community. Here the City has demonstrated that sufficient locations exist to allow for topless entertainment within the Houston city limits.

manner restriction is not whether existing businesses are exempted from its terms, but whether the ordinance allows adequate alternative sites within the locality. Moreover, the topless bar owners have failed to show that there are no adequate relocation sites within the City of Houston. Absent such a showing, they cannot prevail. *Lydo Enterprises, Inc. v. City of Las Vegas,* 745 F.2d 1211, 1213 (9th Cir. 1984); *See also, Adult-world Bookstore v. City of Fresno,* 758 F.2d 1348, 1352 (9th Cir. 1985).

CONCLUSION

The Petition for Writ of Certiorari should be denied because the Fifth Circuit correctly applied this Court's decision in *City of Renton v. Playtime Theatres, Inc.* to the constitutional challenge to the Houston ordinance regulating the location, exterior decor and signage of adult businesses. The Fifth Circuit was correct in upholding the constitutionality of the Houston ordinance as a content-neutral time, place and manner regulation of the secondary effects of constitutionally protected activities.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1987

M.E.F. ENTERPRISES, INC.
and
M.K.D. ENTERPRISES, INC.

Petitioners,

vs.

The City of Houston, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ADDITIONAL REASON FOR GRANTING THE WRIT

The Decision Below Is In Direct Conflict With The Decision In *Frisbee v. Schultz*, 108 S.Ct. 2495 (1988) Which Requires That An Ordinance's Regulations Target And Eliminate No More Than The Exact Source Of The Evil They Seek To Remedy.

In *Frisbee v. Schultz*, ___ U.S. ___, 108 S.Ct 2495 (1988), this Court said that "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." In contrast, the Court below held that "an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest." 837 F.2d at 1276. The differences between the tests are readily apparent; i.e., the standard adopted by the Court below for measuring whether an ordinance is "narrowly tailored" is much more deferential to a governmental choice of means than is the test announced by this Court in *Frisbee*.

The test adopted by the Court below is clearly overbroad. A regulation may effectively promote the government's stated interest; yet, the regulation may not be targeted to eliminate the exact source of the evil sought to be remedied. The facts in this case present that precise situation.

In adopting Ordinance 86-323, the City Council found that "a *concentration* of sexually oriented commercial enterprises can contribute to a decline in the value of surrounding properties"[1] and that "a *concentration* of sexually oriented commercial enterprises can contribute to

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[1] Appendix C to Petition For Writ Of Certiorari, page 61.

an increase in criminal activities in surrounding areas."[2] The effect of *concentration* was crucial to each of these findings. Inasmuch as Petitioner's businesses are not located in close proximity to other sexually oriented businesses, the effects of concentration, i.e. crime and declining property values, cannot serve as a basis for requiring the discontinuance of Petitioners' businesses.[3]

The Respondent apparently concedes that the signage regulations of the ordinance (which are not challenged) are sufficient to cure any evil associated with proximity to neighborhoods and schools; i.e., an adverse effect on minors and the deterioration of neighborhoods.[4] Inasmuch as no other finding of the ordinance would justify forcing the closure of Petitioners' existing businesses, the regulations of Ordinance 86-323 are not "narrowly tailored," because they eliminate more than the exact source of the evil sought to be remedied; i.e., the concentration of such uses.

Because of the overbreadth of the regulations and their imprecise reach, Petitioners respectfully submit that the decision of the Court below is in direct conflict with the decisions of this Court.

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[2] Appendix C to Petition For Writ Of Certiorari, page 61.

[3] In an effort to justify the overly broad reach of the test formulated by the Court below, the Respondent ignores the City Council's crucial finding that it is the *concentration* of sexually oriented businesses that leads to the perceived evils of declining property values and criminal activities. Brief in Opposition, page 6, n.3.

[4] Brief In Opposition, pages 9-10.

CONCLUSION

For the reasons stated herein and the reasons set forth in the Petition For Writ Of Certiorari, Petitioners respectfully pray that the Writ be granted and the judgment of the Court below reversed.

Respectfully submitted,

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